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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

Volume XXXII.

SECOND EDITION.

WITH NOTES AND REFERENCES TO SUBSEQUENT DECISIONS,

BY ROBERT DESTY,
ATTORNEY AT LAW.

SAN FRANCISCO:
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JANUARY TERM, 1867.

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Sixth District.....J. H. McKUNE.
Seventh District.....J. B. SOUTHARD.
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Ninth District.....E. GARTER.
Tenth District.....I. S. BELCHER.
Eleventh District.....S. W. BROCKWAY.
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Fourteenth District.....T. B. McFARLAND.
Fifteenth District.....S. H. DWINELLE.
Sixteenth District.....THERON REED.

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TABLE OF CASES.

	PAGE
Abadie v. Carrillo	172
Ah Loy, Mayo v.	477
Anderson v. Pennie	265
Appeal of Brooks and Josephs	558
Appeal of Lefevre	565
Appeal of North Beach and Mission Railroad Company	499
Appeal of Piper	530
Appeal of Reese	567
Arceo, People v.	40
Argenti v. Sawyer	414
Atherton, Porter v.	416
Austin, Vassault v.	597
Ayres v. Bensley	620
Ayres v. Bensley	632
Barr v. Schroeder	609
Began v. O'Reilly	11
Beaudry v. Valdez	269
Benkert v. Benkert	467
Bensley, Ayres v.	620
Bensley, Ayres v.	632
Blair v. Hamilton	49
Blatner v. Davis	328
Blossom, Fratt v.	219
Blumenberg v. Myres	93
Bonds v. Hickman	202
Bourland, Ghiradelli v.	585
Bowers v. Sonoma County	66
Brooks and Josephs, Appeal of	558
Brooks v. Douglass	208
Brown, In the Matter of	48
Bruck v. Tucker	425
Brummagim, Kidwell v.	436
Buick, Sherman v.	241
Calderwood, Reed v.	109
Carrillo, Abadie v.	172
Central Pacific Railroad Company v. Placer County	582
Colimas, Pico v.	578
Conger v. Gilmer	75
Corbett v. Ewald	493
Corcoran v. Doll	82
Couch, Valencia v.	339
Davis, Blatner v.	328
Davis v. Gale	26
Deringer, Dimick v.	488
Dick, People v.	213
Dimick v. Deringer	488
Doll, Corcoran v.	82
Doll v. Smith	475

Digitized by Google

	PAGE
Dorsey, People ex rel. Galvin *v.*	296
Dougherty *v.* Foley	402
Dougherty, O'Connell *v.*	458
Douglass, Brooks *v.*	208
Dunn, Wetherbee *v.*	106
Eastman, Ellis *v.*	447
Ellis *v.* Eastman	447
Estudillo, Mulford *v.*	131
Ewald *v.* Corbett	493
Fay, Rondell *v.*	354
Foley, Dougherty *v.*	402
Fox *v.* Minor	111
Fratt *v.* Woodward and Fratt *v.* Blossom	219
Gale, Davis *v.*	26
Galvin *v.* Dorsey	296
Gambert, Quivey *v.*	304
Genella, Middleton *v.*	159
Genella *v.* Relyea	159
Ghiradelli *v.* Bourland	585
Gilmer, Conger *v.*	75
Goldstein, People *v.*	432
Grigsby, Hill *v.*	55
Hamilton, Blair *v.*	49
Hickman, Bonds *v.*	202
Hidden *v.* Jordan	397
Hidden, People *v.*	445
Higuera, Morenhout *v.*	289
Hill *v.* Grigsby	55
Hill *v.* Smith	166
His Creditors, Wilson *v.*	406
In the Matter of Brown	48
In the Matter of Kearny Street	499
Irvine, Zenith Gold and Silver Mining Company *v.*	302
Jim Ti, People *v.*	60
Jones, People *v.*	80
Jordan, Hidden *v.*	397
Kearny Street, Matter of	499
Kidwell *v.* Brummagim	436
Kile *v.* Tubbs	332
Knox, Pendegast *v.*	73
Lachanais, People *v.*	433
Lefevre, Appeal of	565
Le Roy *v.* Rassette	171
Lott *v.* Mitchell	23
Love *v.* Sierra Nevada Lake Water and Mining Company	639
Lovejoy, Shriver *v.*	574
Magraw *v.* McGlynn	257
Mahler *v.* Newbaur	168
Mahoney, Tompkins *v.*	231
Manahan, People *v.*	68
Marshall *v.* Shafter	176
Martin, People *v.*	91
Massini, More *v.*	590
Mayo *v.* Ah Loy	477
McCrea, People *v.*	98

Digitized by Google

PAGE

McGlynn, Magraw *v.* ... 257
McGrath, Polack *v.* ... 15
McGuire, People *v.* ... 141
Mendocino County *v.* Morris ... 145
Mendocino County, Warden *v.* ... 655
Middleton *v.* Genella ... 159
Minor, Fox *v.* ... 111
Mitchell, Lott *v.* ... 23
Morenhout *v.* Higuera ... 289
More *v.* Massini ... 590
Morris, Mendocino Co. *v.* ... 145
Mulford *v.* Estudillo ... 131
Mulford, Ward *v.* ... 365
Myres, Blumenberg *v.* ... 93

Newbaur, Mahler *v.* ... 168
Nolan *v.* Reese ... 484
North Beach and Mission Railroad Company's Appeal ... 499
O'Connell *v.* Dougherty ... 458
Omnibus Railroad Company, Robbins *v.* ... 472
O'Reilly, Began *v.* ... 11

Parrott, Wilkinson *v.* ... 102
Pendegast *v.* Knox ... 73
Pennie *v.* Anderson ... 265
People *v.* Arceo ... 40
People *v.* Dick ... 213
People ex rel. Galvin *v.* Dorsey ... 296
People *v.* Jim Ti ... 60
People *v.* Jones ... 80
People *v.* Goldstein ... 432
People *v.* Hidden ... 445
People *v.* Lachanais ... 433
People *v.* Manahan ... 68
People *v.* Martin ... 91
People *v.* McCrea ... 98
People *v.* McGuire ... 140
People *v.* Shaber ... 36
People *v.* Schwartz ... 160
People *v.* Scott ... 200
People *v.* Williams ... 280
Pico *v.* Colimas ... 578
Piper, Appeal of ... 530
Placer County, Central Pacific Railroad Company *v.* ... 582
Polack *v.* McGrath ... 15
Porter *v.* Atherton ... 416
Prader, Providence Tool Company *v.* ... 634
Providence Tool Company *v.* Prader ... 634

Quivey *v.* Gambert ... 304

Racouillat *v.* Rene ... 450
Racouillat *v.* Sansevain ... 376
Rassette, Le Roy *v.* ... 171
Reed *v.* Calderwood ... 109
Reese, Appeal of ... 567
Reese, Nolan *v.* ... 484
Relyea, Genella *v.* ... 159
Rene, Racouillat *v.* ... 450
Robbins *v.* Omnibus Railroad Company ... 472
Robinson, Story *v.* ... 205
Rogers, Wedderspoon *v.* ... 569
Rondell *v.* Fay ... 354

San Francisco Ladies' Protection and Relief Society *v.* Story ... 65
Sansevain, Racouillat *v.* ... 376
Savings and Loan Society *v.* Thompson ... 347

Digitized by Google

PAGE

Sawyer, Argenti v. ... 414
Schroeder, Barr v. ... 609
Schwartz, People v. ... 160
Scott, People v. ... 200
Seaton v. Son. ... 481
Semple v. Wright. ... 659
Shaber, People v. ... 86
Shafter, Marshall v. ... 176
Sherman v. Buick. ... 241
Shriver v. Lovejoy. ... 574
Sierra Nevada Lake Water and Mining Company, Love v. ... 639
Smith, Doll v. ... 475
Smith, Hill v. ... 166
Son, Seaton v. ... 481
Sonoma County, Bowers v. ... 66
Steinberg, Stevenson v. ... 373
Stevenson v. Steinberg. ... 373
Stewart v. Thompson. ... 260
Story v. Robinson. ... 205
Story, San Francisco Ladies' Protection and Relief Society v. ... 65

Thompson, Savings and Loan Society v. ... 347
Thompson, Stewart v. ... 260
Tompkins v. Mahoney. ... 231
Tubbs, Kile v. ... 332
Tucker, Bruck v. ... 425

Valdez, Beaudry v. ... 269
Valencia v. Couch. ... 339
Vassault v. Austin. ... 597

Ward v. Mulford. ... 365
Warden v. Mendocino County. ... 655
Wedderspoon v. Rogers. ... 569
Wetherbee v. Dunn. ... 106
Wilkinson v. Parrott. ... 102
Williams, People v. ... 280
Wilson v. His Creditors. ... 406
Woodward, Fratt v. ... 219
Wright, Semple v. ... 659

Zenith Gold and Silver Mining Company v. Irvine. ... 302

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JUSTICES

OF

THE SUPREME COURT,

DURING THE TERM OF THESE REPORTS.

HON. JOHN CURREY.....CHIEF JUSTICE.

HON. LORENZO SAWYER.....
HON. AUGUSTUS L. RHODES....
HON. OSCAR L. SHAFTER, LL.D.
HON. SILAS W. SANDERSON....
} ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

CHARLES A. TUTTLE, ESQ.....REPORTER.
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WM. G. WOOD, ESQ.....CLERK.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

JANUARY TERM, 1867.

M. BEGAN *v.* JOHN O'REILLY, MICHAEL O'REILLY, AND GEORGE W. COX.

MORTGAGE AS EVIDENCE.—If a mortgage on a mining claim describes it generally by name, and then gives the monuments and cardinal points by which it is bounded on three sides, without naming the boundary on the fourth side, and there is an averment in the complaint stating the fourth boundary, and the complaint also gives the general name and the other three boundaries as contained in the mortgage, without naming the cardinal points, and the mortgage is not set out in *hæc verba* in the complaint, it is admissible in evidence in an action to foreclose it, as against a subsequent mortgagee who denies that the mortgagor mortgaged the land described in the complaint.

PAROL EVIDENCE TO EXPLAIN MORTGAGE.—Where a mortgage on land describes the land generally by name, but does not state all the monuments bounding it on its several sides, and the complaint contains an averment as to what the monuments not given were, parol evidence may be introduced to identify the mortgaged premises as set out in the complaint.

[1] VARIANCE BETWEEN PLEADINGS AND PROOFS.—A judgment will not be reversed on the ground of variance between the pleadings and proofs when the variance does not mislead the appellant to his prejudice.

IDEM.—The seventy-first section of the Practice Act, requiring immaterial variances between the pleadings and proofs to be disregarded, is a most beneficial provision, and should be literally construed and carried out.

---

[1] Cited, Waugenheim *v.* Graham, 39 Cal. 175.

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[12] *APPEAL from the District Court, Tenth Judicial District, Sierra county.

The plaintiff recovered judgment in the Court below. The other facts are stated in the opinion of the Court.

Van Clief & Cowden, for Appellant.

It was not competent for respondent to prove by parol or any other kind of evidence *dehors* the mortgage, that the property described in the complaint was the same as that described in the mortgage, unless there had been some issue upon it or some foundation laid for it in the pleadings. In Doe *v.* Vallejo, 29 Cal. 386, the answer set up the facts disclosing the latent ambiguity, and contained proper averments of the facts showing the true intention of the parties. The plaintiff, therefore, had an opportunity to prepare his evidence to meet those issues and averments; but in the case at bar there is no ambiguity. The Court should have excluded the mortgage, on the ground of variance in the matter of description alone. What we contend for is, that they should either have been confined to the description in their mortgage, or they should have laid the foundation for correcting or explaining that description in their complaint.

Creed Haymond, for Respondent.

A description of the property mortgaged contained in a pleading is not required to follow that in the mortgage. A tract of land may be described in many ways, and where two descriptions are given, the only question is one of identity—a question of evidence and not of pleading. In such case, the variance is only an apparent one, and vanishes before the proof of identity. (Worthington *v.* Hylyer, 4 Mass. 205; Sawyer *v.* Kendall, 10 Cush. 241; Seaman *v.* Hogeboom, 21 Barb. 399.) If there was a variance, the evidence did not injure the defendant. There was a latent ambiguity in the mortgage which was supplied by averment in the complaint. (Doe *v.* Vallejo, 29 Cal. 386.) If there was a variance, it devolved on appellant to show that he was misled thereby to

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his prejudice. (Catlin *v.* Gunter, 10 How. Pr. 321; Catheal *v.* Talmadge, 1 E. D. Smith, 575.)

*By the Court, SHAFTER, J.: [13]

This was an action for the foreclosure of a mortgate bearing date May 16, 1865, executed by the defendants, John and Michael O'Reilly, to the plaintiff. The defendant Cox, who appeals from the judgment, was made a party on the ground that he claimed some lien on the premises, "which lien is subsequent to the lien of the plaintiff." The answer of Cox begins with a detailed confession of what is charged against him, in a general way, in the complaint. That is to say, the answer alleges that the O'Reillys mortgaged to Cox on the 10th of June, 1865, all the land, mining claims, and property described in the plaintiff's complaint—but concludes with a denial that the O'Reillys ever mortgaged the lands described in the complaint to the plaintiff. This was the only issue in the case.

The mortgaged premises were described in the complaint as "all that certain piece or parcel of land and property situated in Greenwood Mining District, near St. Louis, in the county of Sierra and State of California, known and designated as the claims of O'Reilly Brothers, and bounded by Cedar Grove Ravine, the claims of the Greenwood Company, the 'Clipper Ship Claims,' and the summit of the dividing ridge between Slate and Cañon Creeks." The plaintiff offered a mortgage made to him by the O'Reillys bearing date May 16th, 1865. The appellant objected to its introduction on the ground that the description of the property in the complaint was not the same, either in form or substance, as the description contained in the mortgage. The objection was overruled and the appellant excepted.

First—The ruling was right.

It will be observed that the mortgage was not set out in *hæc verba*, but was stated according to its effect as apprehended by the pleader, and thus the possibility of literal variances is precluded. There are two independent descriptions of the mortgaged property given in the complaint. The first is by a

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name, to wit: "Known and designated as the mining
[14] claims *of O'Reilly Brothers;" the second is by boundaries. There are two corresponding descriptions in the mortgage. The description therein by name, is literally identical with that given in the complaint, and the description by boundaries is not contradictory to the description by boundaries in the complaint, but is identical with it, so far as it goes. In the complaint, the land is bounded on four sides by visible objects, but in stating them no reference is made to cardinal points. In the mortgage, the land is bounded on the north by one of the four objects named in the complaint, on the south by another, and on the east by another. The two descriptions, though not equally complete, are the same *pro tanto*. The western boundary, left open in the mortgage, is supplied by averment in the complaint. The latter, in short, discloses the particular character of the boundary, the existence of which is implied in the complaint.

It is further alleged in the complaint that the mortgage contained a covenant for an attorney's fee of ten per cent. in the event of foreclosure; and it appears the mortgage offered in evidence contained no such provision. The judgment recovered by the plaintiff allows nothing for attorney's fees, and conceding that the discrepancy between the pleadings and the proof amounted to a variance, the judgment should not be reversed on that ground, for the Court below was not, and we are not satisfied that the variance misled the appellant to his prejudice. (Pr. Act, sec. 71.) Immaterial variances are to be disregarded on the trial, or whenever the question may be presented. This is a most beneficial provision, and should be literally construed and carried out. (Wolcott *v.* Meech, 22 Barb. 321.)

Second—The plaintiff offered a witness "to prove that the property described in the complaint and that described in the mortgage were the same." The evidence was objected to by the appellant, on the ground that it was irrelevant to the issue.

The only issue, as we have already seen, was as to whether the O'Reillys ever gave the plaintiff a mortgage of the land described in the complaint. If they did, then it stood
[15] admitted *that the subsequent mortgage to Cox cov-

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ered that and not other or different land. As it appeared on inspection that the description by name contained in the mortgage was identical with the description by name given in the complaint, the plaintiff might, perhaps, have safely rested his case upon this single correspondence between his pleadings and proof. If so, then the extrinsic evidence offered to prove a further correspondence was simply redundant. But though the plaintiff was not obliged, on this view of the matter, to put in the evidence, still the evidence was not irrelevant, for it bore directly upon the question of whether the plaintiff had or had not a mortgage on the lands described in his complaint. The witness testified "that he knew the Greenwood Mining District, and that there was but one set of mining claims there known as the 'O'Reilly Brothers Claims;'" and that they were, in fact, bounded by the monuments named in the complaint. By this evidence, the premises mortgaged were the more fully identified with the description given of them in the plaintiff's pleading.

Judgment affirmed.

Mr. Justice SANDERSON expressed no opinion.

MARY POLACK *v.* P. McGRATH, J. W. REAY, TIMOTHY DONLAN, AND MARY DONLAN.[1]

VAN NESS ORDINANCE.—The inclosure of a lot in San Francisco by building a fence around it made of posts eight feet apart and five feet high, with two boards nailed on the same, without actual occupation or cultivation of the lot, did not give such possession of the same to the person inclosing as to pass the title to him under the Van Ness Ordinance.

[2] ADVERSE POSSESSION OF LAND.—One claiming to have acquired a title to land by five years adverse possession, need only show that his adverse possession was held by a substantial inclosure, and need not prove occupation, cultivation, or use of the premises.

[3] WHAT CONSTITUTES PRIOR POSSESSION OF LAND.—The plaintiff in ejectment who

---

[1] Referred to on second appeal, 38 Cal. 667.

[2] Cited, Bailey *v.* Weymouth, Cal. Sup. Ct., July T., 1872, not reported.

[3] Cited, Cannon *v.* Union Lumber Co., 38 Cal. 674; Stainenger *v.* Andrews, 4 Nev. 68. Ejectment, measure of recovery, Slaughter *v.* Fowler, 44 Cal. 200.

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claims to recover on the ground of prior possession alone, without color of title, must show an *actual* prior possession; and if he shows that he had the land protected by a substantial inclosure, even if he had not improved or lived on it,
[16] this *constitutes an *actual* possession. A substantial inclosure is such a fence as a prudent farmer would erect to protect growing crops.

PROOF OF PRIOR POSSESSION.—If the plaintiff in ejectment relies on prior possession alone, without color of title, proof that he had the land inclosed with a fence made of posts eight feet apart, with two rails nailed on, is not sufficient to establish such prior possession.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

Ejectment to recover a lot of land four hundred and twelve and a half feet in length and one hundred and thirty-seven and a half feet wide, being fifty vara lots one, two and three, of block two hundred and eighty-nine of the Western Addition to San Francisco. The defendants entered into possession of the demanded premises in October, 1862. When plaintiff rested, defendants moved for a nonsuit, because plaintiff had not shown such a prior possession as would enable her to recover in ejectment. The Court denied the motion. Plaintiff recovered judgment, and defendants appealed.

The other facts are stated in the opinion of the Court.

E. A. Lawrence, for Appellants.

Such a possession as was proved by plaintiff in this case, has been several times held by the Court to be insufficient to maintain ejectment. (Hutton *v.* Schumaker, 21 Cal. 453; Wolf *v.* Baldwin, 19 Cal. 306; Lawrence *v.* Fulton, 19 Cal. 690.) The mere building a fence is not sufficient. Casual acts of ownership are not sufficient to carry after them the title to the land. (Lawrence *v.* Fulton, 19 Cal. 690.) The case of Lawrence *v.* Fulton was ejectment for land in San Francisco *outside of the lines of the Van Ness Ordinance.* The testimony in favor of plaintiff was much stronger than in this case. He showed a much better possession, accompanied with a *residence on the land* adjoining; yet he was defeated in the Court below, mainly by the charge, "that to enable plaintiff to recover, they (the jury) must be satisfied that the person under whom he (plaintiff) claimed, had had an actual,

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bona fide occupation, and had subjected the land to his will and control for some space of time; that mere assertion of title, coupled with casual acts of *ownership, is not [17] sufficient." The Supreme Court held this charge to be correct.

Spencer & Jarboe, for Respondent.

Every act, definite, positive, and notorious, which conspicuously manifests the intention of a present appropriation, constitutes the possession, which is sufficient to maintain ejectment against any intruder who has not the better title. What are the acts that are definite, positive, and notorious, the law cannot and does not pretend to determine. It—the law—announces the principle, and leaves its application to the varying circumstances of life, and its perpetual change and modification to be determined by a jury, aided and enlightened by an intelligent Judge.

By the Court, RHODES, J.:

It appears from the testimony of the plaintiff's witnesses that Tracy, from whom the plaintiff deduces title, claimed the south half of block number two hundred and eighty-nine, in the Western Addition to San Francisco; that Flint claimed the northern half of the block; that in 1853 Tracy and Flint jointly inclosed the whole block with a fence; that the fence was five feet high, and consisted of posts eight feet apart and two rails, two by three inches; that in June, 1862, a cross fence was built, which, with other fences, constituted the northern fence of the southern half of the block—the premises in controversy; that the fences were from time to time repaired as the rails were found down, up to the entry of the defendant's grantor; that the lots and the adjacent streets were covered with scrub oaks when the fence was built, and have so continued, and that the plaintiff and those under whom she claims have done nothing on the lot besides the building and keeping up of the fences.

There can be no doubt that those acts on the part of the plaintiff's grantors were not sufficient to entitle them to the benefits of the Van Ness Ordinance. They did not have such

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[18] *an actual possession of the premises as is required by the ordinance to enable them to acquire the title under its provisions. "By actual possession," says Mr. Chief Justice Field, in Wolf v. Baldwin, 19 Cal. 306, "as the terms are here used, is meant that possession which is accompanied by the real and effectual enjoyment of the property. It is the possession which follows the subjection of the property to the will and dominion of the claimant, to the exclusion of others, and this possession must be evidenced by occupation or cultivation, or other appropriate use, according to the locality and character of the particular premises. An inclosure, by an ordinary fence, of the premises without residence thereon or improvements, or cultivation or other acts of ownership, is of itself insufficient." (See also Davis v. Perley, 30 Cal. 630.)

The plaintiff does not rely for a recovery solely upon title acquired under the operation of the Van Ness Ordinance, but also contends that she is entitled to recover on the ground of prior possession and the usual legal presumption arising therefrom. In each of the opinions delivered in Wolf v. Baldwin, the position which was requisite in order to answer the demands of the Van Ness Ordinance was defined in terms more comprehensive than would be necessary in describing such possession as would be held sufficient when shown by a person claiming the benefits of the Statute of Limitations. Something, it was thought, was due to the word "actual," as qualifying "possession," and also to the words "occupied and possessed," as they are employed in the proviso to the first section; and the object of the ordinance was kept in view, which was considered to be "to protect actual possessors—parties who were seeking by settlement to build up houses within the city limits, and not migratory squatters or mere land speculators."

Adverse possession may be sustained upon evidence that does not come up to the full measure indicated in that case, as required of those claiming under the ordinance. The party setting up adverse possession, in most cases wherein he prevails, proves that he or his tenants or agents resided [19] upon or *cultivated the premises, or put them to some

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appropriate use; but in many cases the evidence would be ample without going to that extent. It is possible for him to have a possession which will be held sufficient to sustain his answer to the Statute of Limitations without having devoted the land to any present beneficial use. It is provided by sec. thirteen of the Statute of Limitations that, "for the purpose of constituting an adverse possession by a person claiming title not founded on a written instrument, judgment, or decree, land shall be deemed to have been possessed and occupied in the following cases only: 1. When it has been protected by a substantial inclosure. 2. When it has been usually cultivated or improved. One of the cases mentioned in the eleventh section, in which the land shall be deemed to have been possessed and occupied by the person claiming adversely under title founded upon a written instrument or a judgment or decree, is also where the land has been protected by a substantial inclosure. The statute has in these respects remained in force since its passage in 1850, and the person claiming the adverse possession who shows a substantial inclosure of the premises of which he claims the title, need not prove any further occupation, cultivation, or use of the premises.

The difficulty attending the attempt to define possession of lands, or to lay down precise rules by which the sufficiency of a given state of facts to constitute possession may be determined—whether it is such as is required to be shown by a person claiming adversely without color of title, or by one relying on prior possession—has often been experienced and admitted by Courts of the highest standing; and indeed none but very general rules can be laid down, leaving each case to depend mainly on its own circumstances. All concur in one respect, and that is the only point involved here, taking the case as presented by the plaintiff's testimony, and that is, that the possession must be actual. (See 2 Smith's Lead. Cas. 541, notes to Nepean *v.* Doe; 2 Wash. on Real Prop. 480.)

A difficulty is again encountered in defining actual possession. It is a mixed question of law and fact. The facts being *found or admitted, their sufficiency to [20] prove actual possession is a question of law. In Jack-

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son v. Schoonmaker, 2 Johns. 234, the defendant proved that the land was inclosed by a possession fence, which was made by trees felled and lapped one upon another, and that the fence had ever since been kept up; and Mr. Chief Justice Kent said: "The possession fence, as it was termed, which was run around the large tract in 1774, I do not consider as an adverse possession sufficient to toll the right of entry of the true owner, after twenty years. This mode of taking possession is too loose and equivocal. There must be a real and substantial inclosure and actual occupancy, a *possessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defence and is to countervail a legal title." In Plume v. Seward, 4 Cal. 94, in which the question of prior possession was involved, it was said by Mr. Chief Justice Murray: "From a careful examination of the authorities, I am satisfied that there must be an actual *bona fide* occupation, a *possessio pedis*, a subjection to the will and control, as contradistinguished from the mere assertion of title, and the exercise of casual acts of ownership, such as recording deeds, paying taxes," etc. This is followed by remarks which materially qualify and destroy the force of the language cited, and which were wholly unnecessary to the decision of the points involved in the case. We shall not discuss the doctrine advanced in qualification of the more general rule first stated, but will content ourselves with saying that the opinion, in so far as it intimates that the possession of a part of a tract of land marked by distinct boundaries, by the person claiming the whole, will draw after it the possession of the whole tract, is not in accordance with the general rule on the subject, and is opposed by many subsequent cases in this Court. (Garrison v. Sampson, 15 Cal. 93; Coryell v. Cain, 16 Cal. 573; Hestres v. Brannan, 21. Cal. 425; Hutton v. Schumaker, Id. 453.)

The general rule as first stated, without the subsequent modifications or exceptions, very nearly conforms to the [21] *doctrine of the cases on that subject. The Supreme Court of Pennsylvania, in defining the nature of adverse possession, say, in language often cited for its completeness and accuracy, that it must be "an actual, continued, visible,

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notorious, distinct, and hostile possession." (Hawk *v.* Senseman, 6 S. and R. 21.) Wherein, it may be asked, does the actual possession, required in the case of prior possession, differ, if at all, from the actual possession demanded in adverse possession? We see no ground for drawing any distinction, and think none exists. The statute has come to the aid of the Court in defining adverse possession, and in the section already cited, has declared, that where the land has been protected by a substantial inclosure, or where it has been usually cultivated or improved, it shall be deemed to have been possessed and occupied by the person claiming adversely, but without color of title. This constitutes actual possession, and perhaps fills the measure of the definition given in Hawk *v.* Sanseman.

These provisions of the statute were not adopted as rules applicable in cases of asserted prior possession, but there is no difference as to the mode of acquiring or holding the actual possession in the two cases, and the acts that would be required in one case will suffice in the other; so that when the actual possession is shown, in support of a claim to prior possession, if there is also proven the claim of title in hostility to that of the true owner, it will amount to adverse possession. The statutory rule recommends itself by its simplicity and comparative certainty, and no good reason appears why it should not also be applicable to cases of prior possession.

Under that rule, the inclosure which is relied upon to establish prior possession must be shown to be substantial. The purpose of an inclosure is to protect the land; and to be considered as substantial it must be sufficient to protect the land against the intrusion of cattle—not that it must be so high, strong, and close as to preclude the possibility of its being broken, but it should be of such strength as a prudent farmer erects to protect his growing crops. An inclosure that falls short of this serves no other purpose than to mark the *lines of the tract of land, and is of no greater signifi- [22] cance or value to prove actual possession than are corner posts or blazed line trees. This is also the doctrine of many cases in this Court. (Baldwin *v.* Simpson, 12 Cal. 560; Wolf *v.* Baldwin, 19 Cal. 306; Garrison *v.* Sampson, 15 Cal.

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93; Hestres *v.* Brannan, 21 Cal. 425; Hutton *v.* Schumaker, 21 Cal. 453.)

The fences which constituted the only inclosure of the lots in controversy, admitting that they were erected and maintained as the plaintiff's witnesses stated, fall far short of a substantial inclosure. We are therefore of the opinion that the defendant's motion for a nonsuit should have been sustained.

Judgment reversed, and the cause remanded.

SHAFTER, J., concurring specially:

I concur in the judgment, on the ground that the plaintiff's evidence had no tendency to prove a *possessio pedis*.

CURREY, C. J., dissenting:

While I am of the opinion that the plaintiff's fence was not of a character sufficient to constitute an adverse possession against the true owner, it was, taken in connection with the other proprietary acts exercised by the plaintiff and her grantors in respect to the property, sufficient, in my judgment, to establish her possession and right of possession as against tortious intruders; therefore I dissent from the conclusion to which a majority of the Court have come.

SAWYER, J., also dissenting:

The evidence shows an inclosure by a fence—not very substantial, it is true—maintained during a period of more than ten years, and other acts of dominion exercised over the lot by the plaintiff and her grantors. It also discloses a recorded title derived from the original locators of a larger claim [23] taken *up as early as 1855, embracing the *locus in quo*, consisting of conveyances of the original claimants and their successors in interest, and a conveyance by the Sheriff in pursuance of a sale under a judgment foreclosing a mortgage. The claims and acts of ownership of the plaintiff and grantors were notorious, and the defendants were naked intruders upon the well known claim and within the inclosure of their neighbor. Whatever the rule might be, if the contest was between the plaintiff and the holder of the title, I am not

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prepared to say that the jury were not justified by the evidence in finding against the defendants. I think, therefore, that the verdict ought not to be set aside on the ground of insufficiency of the evidence, and I see no other sufficient ground for reversing the order of the District Court. I think the judgment and order should be affirmed.

CHARLES F. LOTT *v.* H. K. MITCHELL AND E. M. ROOT.

BOND OF INDEMNITY TO SHERIFF.—If in a bond to indemnify a Sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the Sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment.

APPEAL from the District Court, Second Judicial District, Butte county.

The defendants appealed from the judgment.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellants.

The complaint does not allege the payment of the judgment of Ellsworth *v.* Middleton, and consequently there has been no breach of the indemnifying bond. The Sheriff was not indemnified against a liability, but against actual damage, and he sustains no damage until he pays the judgment, or some part thereof. *(Wilson *v.* McEvoy, 25 Cal. [24] 169; Gilbert *v.* Wyman, 1 Comstock, 550; Edwards *v.* Bodine, 11 Paige, 224.)

Jos. E. N. Lewis, for Respondent,

Contended that the bond in suit was in legal intendment different from the one in Wilson *v.* McEvoy, and was in effect to indemnify against liability as well as against an actual loss.

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By the Court, SHAFTER, J.:

The complaint alleges that Mitchell brought an action of replevin against Morris and another, and that the property described in the complaint and affidavit was seized by W. D. Middleton, Sheriff of Butte County. That one Ellsworth gave due notice to said Sheriff, under the one hundred and ninth section of the Practice Act, that the property was his, and that thereupon Middleton demanded of Mitchell a bond of indemnity, which demand was complied with. The undertaking was signed by Mitchell, Root, and Haun, and was conditioned that Mitchell "should well and truly keep and bear harmless and indemnify the said W. O. Middleton, Sheriff, as aforesaid, of and from any and all damages, costs, suits, judgments, and executions that shall or may at any time arise, come, or be brought against him, by reason of the detention of said property or the delivery thereof to the plaintiff." It is further alleged that the claimant, Ellsworth, brought an action thereafter against Middleton for the taking of the property, and recovered a judgment for the sum of two thousand seven hundred and sixty-five dollars, and thirty-one dollars costs. It is further alleged that "the conditions of the aforesaid bond are and have been broken by the said Mitchell in this—that though he had full knowledge of and was often requested by the plaintiff to pay the aforesaid judgment against said Middleton on account of the matters and things set forth in said bond, he has and still does continue to neglect to wholly keep and bear harmless and indemnify the said Middleton of and from any and all damages, costs of suit, judgment, and [25] *executions that were brought against said Middleton by reason of the detention of the property, or delivery thereof to the said Mitchell. Plaintiff avers that Mitchell has and still does wholly fail to pay or satisfy in whole or in part the aforesaid judgment." It is also averred that both the bond and Ellsworth judgment have come to the plaintiff by assignment.

The complaint was demurred to on the ground of a want of facts. The demurrer was overruled, and; the defendants failing to answer, judgment was entered for the plaintiff for the amount demanded.

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The only question necessary to be decided is whether the complaint is defective for the reason that it does not aver a payment by Middleton of the Ellsworth judgment.

The undertaking was a mere bond of indemnity, and the case is therefore not within the principle of Wilson v. McEvoy, 25 Cal. 169, and Prader v. Grimm, 28 Cal. 11. The counsel for the plaintiff, however, insists that the undertaking is that Middleton should not be sued; or if sued, that no judgment should be recovered against him—in short, that the obligee should never be charged with any liability on the ground of the seizure made by him in the course of the replevin.

The distinction is between contracting that an event shall not happen, and contracting to indemnify against the consequences of the event if it should happen. The usual condition of a jail bond is that the prisoner "shall not go without the limits," and in such case the doing of the prohibited act works a breach. (Kip v. Brigham, 7 John. 168.) In Warwick v. Richardson, 10 Mees. & W. 284, one of the conditions of the bond was to save from suits, and the non-performance of this undertaking, that the plaintiff should not be sued, was the breach assigned, and the one on which the plaintiff recovered. But in the case at bar, the obligors do not undertake that suits shall not be brought against Middleton, nor that judgments shall not be rendered, nor that executions shall not be issued against him; but, on the contrary, the undertaking assumes that such things "shall or may *arise," and provides, if they should, that the [26] obligors will indemnify Middleton from any actual damage that he may sustain by reason thereof. No such damage is averred.

Judgment reversed and cause remanded, with leave to plaintiff to amend his complaint within ten days after filing remittitur and notice.

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D. A. DAVIS, WM. HENDERSON AND J. McNAUGHTON v. O. P. GALE.[1]

PRIOR RIGHT TO WATER BY APPROPRIATION.—A person who has appropriated the water of a stream, and caused it to flow to a particular place by means of a ditch, for a special use, may afterwards change the use to which he first applied the water, and the place at which he used it, without losing his priority of right, as against one who has dug a ditch from the same stream before the change is made.

IDEM.—One who has appropriated the water of a stream by means of a ditch for the purpose of working a particular mining claim, may, after he has worked out the claim and abandoned the same, extend his ditch and use the water at other points, and for a different purpose, without losing his priority of right as against one who afterwards dug a ditch from the same stream and appropriated water before the claim was worked out.

RIGHT TO WATER.—Appropriation and use for a beneficial purpose are the tests of right to water in the mineral regions, while the place and character of its use are not such tests.

ABANDONMENT OF WATER RIGHT.—The facts that water was appropriated for a particular purpose, and that the purpose has been fully accomplished, and that when accomplished the appropriators dispersed and allowed a long time to elapse without using the ditch, and then sold it for a nominal sum, may be received in evidence as tending to show abandonment.

IDEM.—One who has abandoned his prior right to the use of water cannot by afterwards making a sale of the same revive his prior right in favor of his grantees, even if the sale is made in good faith.

STATUTE OF LIMITATIONS AS TO WATER.—If one who has the prior right to the use of water permits another to acquire and hold for five years continuous adverse possession of the same, or any part thereof, he loses his right to the same or that part thereof which the adverse possessor enjoyed.

TURNING WATER INTO STREAM WITHOUT INTENDING TO RECAPTURE IT.—If two persons, one prior in point of time to the other, appropriate water from the same stream, by means of ditches, and a third person turns water into the stream from his ditch starting out of another stream, without the intention of recapturing it, the water thus turned in becomes *publici juris*, and belongs to the persons who appropriated the stream, according to their priority of right.

RIGHTS OF PRIOR APPROPRIATOR OF WATER.—If two persons appropriate water from the same stream, one prior in point of time to the other, and a third person builds a flume in the stream so as to increase the flow of water, the prior
[27] *appropriator is first entitled to the increased flow of water, to the extent of his appropriation.

STATUTE OF LIMITATIONS AS TO WATER RIGHTS.—If one who has taken adverse possession of water, as against a prior appropriator, suffers a portion of the same to flow down to accommodate miners working in the stream, this does not prejudice his adverse possession so as to prevent the Statute of Limitations from running.

APPEAL from the District Court, Fifth Judicial District, Tuolumne county.

[1] Approved, Woolman v. Garringer, 1 Mont. 543.

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This action was commenced in October, 1864. In 1852, the Tuolumne Water Company excavated a ditch from the Tuolumne River and Five Mile Creek. This company had a surplus of water which it turned into Mormon Creek above the heads of plaintiffs' and defendant's ditches, until the summer of 1864, when it was able to use it all by an extension of its ditch. There was a company of miners at work in the bed of Mormon Creek below head of defendat's and above the head of plaintiffs' ditch, who claimed the right to have water flow down the creek to their claim. The defendant, from 1853 up to the commencement of the suit, had been in the habit of turning down to this company of miners, from twenty-seven to forty-five inches of water, when they needed it to work their claim. Some miners also constructed a flume along the bed of the creek above the head of defendant's ditch, which it was claimed increased the flow of water to the head of defendant's ditch. Defendant claimed the first right to this increase of water. Defendant asked the Court to instruct the jury as follows:

"If there is water enough in Mormon Creek during a great portion of the year to supply both defendant's and plaintiffs' ditches, then both parties have the right to use said water as long as they do not interfere with the rights of each other; but if, during a portion of the year, to wit, the latter part of the dry season, there is not water enough in said creek to supply both of said ditches to their full capacities, and if during such scarcity of water defendant, with full knowledge of plaintiffs, appropriates all the water of said creek and turns it *into his ditch, claiming title thereto, that [28] such appropriation, use, occupation, and possession of the first use of said water by defendant, is adverse to the claim of plaintiffs to said water, and if the jury find, from the evidence, that the defendant has so appropriated and possessed the first use of said water quietly, peaceably, and without let or hindrance from any one, whenever there was such scarcity of water, for a period of over five years, during the dry season next before the commencement of this suit, then they must find for the defendant.

"If during the dry season defendant turned out forty-five

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inches of water from his ditch into the creek, or let it pass the head of his ditch, for the use of miners at work on the banks of the creek below, and if after said water has been used plaintiffs turn it into their ditch, there not being enough to give them a supply, such use of the waters by plaintiffs is no interference with the quiet, peaceable, and adverse use of the water by defendant.

"If you find that the plaintiffs' grantors originally took and appropriated six streams of water, and the defendant thereafter took and used five of such streams, continuously and uninterruptedly, for a period of five years prior to the commencement of this action, with the knowledge of plaintiffs or their grantors, in such case the defendant would acquire an absolute right to such five streams so taken and used by him, by virtue of the Statute of Limitations, notwithstanding the plaintiffs used their ditch and the remaining stream of water during said five years continuously, and the plaintiffs cannot recover such five streams in this action."

The Court refused said instructions, and defendant's counsel excepted.

The words "stream of water," as used in the last of said instructions, was defined on the trial by witnesses to mean a sluice head of twelve inches.

The other facts are stated in the opinion of the Court.

[29] **Caleb Dorsey*, for Appellant.

The first appropriation of the water by plaintiffs' grantors was for a specific purpose, to wit, to work their own claims. After they had accomplished this purpose and worked out their claims, they could not change the character of their appropriation so as to interfere with defendant's rights. Defendant had made a general appropriation of the water before plaintiffs' grantors had worked out their claims, and even if plaintiffs could change the character of the appropriation of their grantors, they could not do so as against defendant, who had acquired rights before any manifestation was made of a new appropriation. The principle in appropriating water should be the same as that which applies to mining ground. (O'Keef *v.* Cunningham, 9 Cal. 590.) In Maeris *v.* Bicknell,

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7 Cal. 261, the point was not decided, but was reserved. Even if plaintiffs' grantors after they left the ditch asserted a right to it by preventing any one else from using it, this was not an assertion to the right of the water. Water is held by appropriation and use. (McKinney *v.* Smith, 21 Cal. 388.) The evidence tended to show that defendant had been more than five years in the adverse possession of the water. The Court should have given the instructions refused. The fact that defendant turned out a part of the water to miners below did not destroy his adverse possession. Besides, even if defendant had adverse possession of a part of the water, the statute would run as to this part.

E. F. Hunter, for Respondents,

Confined his argument to the point as to whether the verdict was warranted by the evidence.

George Cadwalader, also for Respondents.

The first instruction not given was correctly refused, because the words "*the latter part of the dry season*" are too vague, and too small a space of time would satisfy them. It makes the adverse use by defendant for five dry seasons sufficient for the Statute of Limitations, instead of five consecutive years. It does not tell the jury that defendant's adverse possession *must have been exclusive for five [30] years. To perfect defendant's title under the statute, there must have been five years continuous diversion of the water from plaintiffs. (Washb. on Ease. 221.)

The second instruction refused is not law. If defendant turned the water down to miners, he did not have adverse possession of it. Besides, when defendant turned the water down, it reached plaintiffs. The last instruction refused is inexplicable, as it assumes that there may be a division of water into streams. It seems also to create a kind of tenancy in common, or partnership, in the waters of a creek.

By the Court, SANDERSON, J.:

Action to restrain the defendant from diverting the waters of Mormon Creek, in Tuolumne county, to the prejudice of

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the plaintiffs' prior rights, and for damages already sustained. The case was tried with a jury in the Court below, and a general verdict in favor of the plaintiffs was rendered. Under the direction of the Court, the jury also rendered a special verdict, in view of which it was claimed by the defendant that the judgment should go with him. The Court held otherwise, and rendered a judgment for the plaintiffs for the amount of damages found by the jury, and perpetually restraining the defendant from interfering with or diverting the waters of the creek at any time in such a manner as to interrupt or disturb the use of the plaintiffs to the extent of their interest therein, which was fixed at sixty-two inches. A motion for a new trial was made and denied.

The complaint is in the usual form in such cases. An appropriation and continuous use of the waters of Mormon Creek, running as far back as the spring of 1851, for mining and agricultural purposes, by means of a ditch dug for that purpose, is alleged; and also a subsequent diversion of the water to the prejudice of the plaintiffs by defendant, by means of a ditch which taps the creek at a point above that of the plaintiffs.

[31] *The defendant denies the prior right of the plaintiffs, and sets up a prior right in himself, and avers an appropriation and continuous use of the waters of the creek to the capacity of his ditch, which is four hundred inches, for mining and agricultural purposes, from a date prior to the appropriation of the plaintiffs.

The defendant further alleges that the plaintiffs' ditch was dug out and the waters of the creek appropriated by them or their grantors solely for the purpose of working a few mining claims which belonged to the first owners of the ditch; and that said claims were worked out, and, together with the ditch, abandoned by the then owners long prior to the time at which the plaintiffs became the owners or possessors of the ditch.

He further avers that he and his grantors have been in the quiet and peaceable possession of the waters of the creek to the full capacity of his ditch for about thirteen years, prior to the commencement of this action, without let or hindrance on the part of the plaintiffs or their grantors.

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He also seeks the protection of the Statute of Limitations, and avers that neither the plaintiffs nor their grantors have been in the possession of the waters of the creek within five years next preceding the commencement of this action, except in subordination to the alleged right of the defendant to divert the same to the extent of four hundred inches.

No exceptions were taken to the admissibility of evidence, and all the questions made by counsel relate to the law of the case, as applicable to the facts specially found by the jury, and as construed by the Court in refusing and giving instructions.

The plaintiffs' ditch was dug in March or April, 1851, and sixty-two inches of the waters of the creek thereby appropriated. The ditch was dug and said appropriation made solely for the purpose of working certain mining claims which belonged to the parties by whom the ditch was dug; and said purpose was fully accomplished prior to the fifth of July, 1855, which was the date at which the ditch was sold to Reynolds, Goodwin & Co., by whom the ditch was extended *and afterwards sold to Battenfield in May, 1858, who [32] afterwards sold to plaintiffs on the tenth of February, 1864. More than two years intervened between the date at which the mining claims were worked out and abandoned and the first sale of the ditch; during which time the owners made no use of the ditch, but went to other parts, leaving the ditch, however, in the care of one Demple, with license to use the same. The plaintiffs now use and seek to use the waters of the creek for mining and other purposes at other localities than those for which their ditch was originally constructed, which was also true of Reynolds, Goodwin & Co., and Battenfield, while they respectively owned the ditch.

The defendant's ditch was dug in August or September, 1851, and prior to any change in the use of the water by plaintiffs' first grantors.

The foregoing are all the facts that are useful in illustrating the points made upon the evidence. The other facts bear more especially upon the question of the Statute of Limitations, and will be noticed hereafter.

The fact that the plaintiffs' ditch was dug and their appro-

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priation first made solely for working certain mining claims, long since worked out and abandoned, gives rise to the principal question. In view of that fact it is claimed that the plaintiffs' first grantors lost their right to the use of the waters of the creek the moment the purpose for which they first appropriated them had become accomplished, and that neither they nor their grantors could thereafter rightfully claim the use of the water, on the score of their original appropriation, for the purpose of working other claims, and that hence, conceding the original appropriation of the plaintiffs to have been prior to that of the defendant, the relative rights of the parties became changed when the original object of the plaintiffs had been accomplished, and thereafter the defendant became first in right and the plaintiffs second.

How far a party's right to the use of water is limited by the object for which it was first appropriated arose in the case of Maeris *v.* Bicknell, 7 Cal. 261. Mr. Justice [33] Burnett, *by whom the opinion of the Court was delivered, said: "The next question which arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use without losing that priority as against those whose rights have attached before the change. This question we think can admit of but one answer. It would seem clear that a mere change in the use of water, from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party. It would destroy the utility of such works were any other rule adopted. As to the question whether a party can change the use of the water from one purpose to another without affecting his prior right, we express no opinion, as the point does not arise in this case."

Some doubt as to the soundness of this view seems to have been afterwards entertained, but for what reason we are at a loss to perceive. In McKinney *v.* Smith, 21 Cal. 383, Mr. Justice Norton said: "We are aware that in the case of Maeris *v.* Bicknell it was decided that a party who makes an appropriation of water can change the place of its use, as by an extension of the ditch, without losing his priority as against

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those whose rights have attached before the change, but the Court expressly reserved the expression of any opinion whether a party could change the use of the water from one purpose to another without losing his priority. * * * There may be difficulty, in many cases, in determining that the appropriation was limited to a special purpose or to a particular locality. Each case must be decided upon its peculiar facts. * * * On the facts as they existed when the defendants began their works they had the right to appropriate the water to any use that would not interfere with the plaintiffs' use of it for the special purpose to which they had appropriated it."

Suppose a party taps a stream of water for the purpose of surface mining in a given locality, and afterwards finds that *the ground will not pay or that ground farther [34] on will pay better, may he not abandon the former and extend his ditch to the latter without losing his priority? Or suppose, after working off the surface, he finds quartz, may he not erect a mill and convert the water into a motive power without forfeiting his prior right? Suppose he appropriates the water for the purpose of running a saw mill, and, after the timber is exhausted, he finds that a grist mill will pay—may he not convert the former into the latter without surrendering his priority to some one who may have subsequently and in the meantime tapped the same stream?

We think all this may be done, and are unable to suggest a plausible reason why it may not. In cases like the present a party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment. Appropriation, use, and nonuse are the tests of his right; and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and privileges. The water rights involved in this case may not be of great value, and their acquisition may not have been attended with much

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expense, but there are many similar privileges which have been secured only by the use of large sums of money, and to hold that they are limited to the particular place or to the particular purpose in view of which they were first sought would, for obvious reasons, lead to most pernicious results and greatly delay and embarrass the development of the resources of the country.

The only question which can legitimately arise in connection with the facts under consideration is abandonment. The fact that the water was appropriated solely for a special and particular purpose, and the further fact that that purpose had been fully accomplished, and the further fact that the [35] parties *concerned in it had dispersed to other parts, and that more than two years were allowed to pass without their giving any attention to the ditch, and then only to make a sale of it to others at the nominal sum of twenty-five dollars, all bear directly on that question. In view of those facts, a jury might find abandonment, and in that event the subsequent sale to Reynolds, Goodwin & Co., whether in good faith or not, would not have revived the right which was secured by the first appropriation.

There was testimony tending to show that the defendant had been in the adverse possession of the water of Mormon Creek, as against the plaintiffs and their grantors, to the capacity of his ditch, for more than five years prior to the commencement of the action, and the instruction asked by the defendant bearing upon the Statute of Limitations ought to have been given. Although the plaintiffs may have had the prior right, yet if they or their grantors allowed the defendant to acquire and hold for five years adverse possession of the water which they had appropriated, or any part thereof, they, to that extent, lost their right by force of the statute. Upon this question, in The Union Water Company *v.* Crary, 25 Cal. 509, we had occasion to say that "The right of the first appropriator may be lost, in whole, or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted, and adverse enjoyment of the watercourse, or of some certain portion of it, during the period limited by the Statute of Limita-

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tions for entry upon lands, the law will presume a grant of the right so held and enjoyed by him."

The fact that the Tuolumne Water Company at one time turned water from their ditch into Mormon Creek, thereby increasing the volume of water, and the further fact that some strangers flumed the creek between the defendant's ditch and that of the plaintiffs, have, as we conceive, no direct bearing upon the rights of either party. If the water of the Tuolumne ditch was turned in without any intention of recapture, it became *publici juris*, and inured as much to the benefit of the *plaintiffs as the defendant. Their rights [36] thereafter remained relatively the same as before, and were not differently affected than they would have been had the increase of water been due to some natural cause. So as to the fluming of the creek. If the effect was to decrease absorption and evaporation so that the creek thereafter would have delivered water at the plaintiff's ditch at seasons when otherwise it would not have done so, the increased facilities inured as much to the benefit of the plaintiffs as if they too had resulted from some natural cause instead of the agency of strangers.

Nor was the adverse possession of the defendant, as against the plaintiffs, in any manner prejudiced by the fact that the defendant from time to time yielded to the demands of the miners at work below his ditch and allowed a certain quantity of water to flow down to them for their use. If that was the only reason why he allowed the water to pass, his doing so was no concession to the claim of the plaintiffs.

The order denying a new trial is reversed and a new trial is granted.

THE PEOPLE *v.* CARL SHABER.

INDICTMENT FOR BURGLARIOUSLY BREAKING INTO HOUSE. — An indictment for burglariously breaking and entering a house in the nighttime, with intent to commit larceny, is good if it charge the breaking and entering with intent to commit larceny, without charging whose goods the defendant intended to steal, or that there were any goods in the house which the defendant could steal.

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CRIME OF BURGLARIOUSLY ENTERING HOUSE.—The crime of burglariously breaking and entering a house with intent to commit a larceny, is complete if the fact is found that the defendant broke into and entered for that purpose, even if there are no goods in the house of which a larceny could be committed.

APPEAL from the County Court, city and county of San Francisco.

The indictment charged that the defendant, "on the twelfth day of August, A. D. 1866, at the city, county, and State aforesaid, about the hour of twelve of the clock, M., of the nighttime of the same day, with force and arms, the [37] house, *room, apartment, and tenement of one Jacob G. Jackson and William E. Wood, doing business under the name and style of J. G. Jackson & Co., then situate, feloniously and burglariously did break and enter with intent then in said house, room, apartment, and tenement, to commit larceny, contrary to the form and effect of the statute in such case made and provided," * * * The defendant appealed.

The other facts are stated in the opinion of the Court.

George W. Tyler, for Appellant.

At common law, it was necessary that the breaking and entering should be with intent to commit felony. Our statute only declares the common law. If the indictment had charged that defendant broke and entered, with intent to steal the personal property of Jackson & Co., then being therein, the Court could have seen, from the facts alleged, that it was defendant's intent to commit larceny. (Regina *v.* Lawes, 1 Car. & Kir. 62; Regina *v.* Clarke, Id. 422.) It is not sufficient to allege assault with intent to commit murder, or rape, etc., for they are conclusions of law to be drawn from certain facts stated. (Rex *v.* Jenks, 2 Leach C. C. 744; 2 East P. C. 514; Wilmot, Law of Burglary, 217.)

Attorney-General, for the People.

Under our statute, it would have been error to set forth a larceny committed, as two offences would have been united in the same indictment. (People *v.* Garnett, 29 Cal. 622.) Section fifty-eight of the Cr. Pr. Act was amended in 1858 to

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meet the decision of People *v.* Murray, 8 Cal. 519. Probably, at common law, the allegations of this indictment would have been insufficient, yet it is difficult to say how specific the allegations were required to be. (2 Bish. Cr. Pro., sec. 113; People *v.* Ah Ye, 31 Cal. 451.) I claim that, under the provisions of our Practice Act and the decisions of this Court, this indictment must be sustained.

*By the Court, SHAFTER, J.: [38]

The appellant was indicted for feloniously and burglariously breaking and entering in the nighttime a certain house (describing it) "with intent to commit larceny." On conviction, the defendant moved in arrest of judgment, on the ground that the indictment did not state whose property the defendant intended to steal, nor that he intended to feloniously steal, take, and carry away any property then being in the house entered.

The indictment charges the offence in the very terms used in defining it in the fifty-eighth section of the Crimes Act, as amended in 1858, (Stat. 1858, p. 206,) and with all the particularity required by the two hundred and thirty-fifth section of the Cr. Pr. Act. The case cannot be distinguished from 6 Cal. 487; 7 Id. 403; 10 Id. 309; 14 Id. 30; People *v.* Garcia, 25 Cal. 533; People *v.* King, 27 Cal. 510; Regina *v.* Lawes, 1 Car. & K. 62; Regina *v.* Clarke, 1 Id. 422–3. As a larceny actually committed is not made an element in the offence, it cannot be needful to allege one, either generally or by an averment of the facts entering into and constituting its definition. And as a forcible entry, etc., with a larcenous intent, is all that is made essential to the crime, we consider that a conviction would be due, even though it should appear that there were no goods in the building at the time the entry was made. The forcible entry and the intent being found or given, the crime would be complete, even though it should turn out that, contrary to the calculations of the burglar, the building was empty. The sting of the crime is, in short, the guilty purpose, without reference to the possibility of accomplishing it, in any given instance.

The judgment is affirmed.

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[39] *SANDERSON, J. dissenting:

I am of the opinion that the indictment is not sufficient because it does not describe the intent with which the "breaking and entering" was effected. It is not sufficient in indictments for burglary, to allege the intent to be "to commit larceny," or "to commit rape," or "to commit murder," as the case may be, and there stop. The offence intended must be described, or, in other words, the acts which the defendant intended to commit, after having effected an entrance into the building, must be described for the purpose of showing what the intent was. This is but a familiar principle in every system of pleading, either civil or criminal. The facts are to be stated, to the exclusion of conclusions of law to be drawn therefrom. Where an intent to commit an offence is to be charged there is as much necessity for describing the offence intended as there is where the commission of the offence is charged directly. It is not for the pleader to say whether the acts intended amount to larceny, rape, or murder, but for the Court, and the acts, therefore, which constitute the one or the other must be alleged. If it would be insufficient in an indictment to allege that the defendant at a certain time and place committed larceny, it is for the same reason insufficient to so allege when it is proposed to charge him with an intent to commit the offence. The averment is no more a conclusion of law in the former than in the latter case. The acts constituting the offence, whether it was in fact committed or was intended to be committed, must be stated, and that, too, for the same reason. In my judgment, an intent to do an impossible act is not criminal, and hence the facts, showing the intent to have been possible, should be stated.

I think the judgment should be reversed.

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*THE PEOPLE v. JOSÉ MARIA ARCEO. [40]

JURORS SPEAKING DIFFERENT LANGUAGES. — The proviso to the act concerning jurors, excepting the counties of Monterey, etc., from the provisions of the act which requires the juror to understand the language in which the proceedings of the Court are had, does not deprive the Court in one of the excepted counties of the power to excuse jurors of its own motion, when those on the same panel speak several different languages.

IDEM. — Such proviso can have effect by construing it to mean that a want of sufficient knowledge of the language in which the proceedings of the Courts are had is not a legal disqualification of a juror, but that the Court may require in its discretion all the jurors on the same panel to understand the same language.

[1] COURT MAY EXCUSE JURORS. — The Court may, of its own motion, for any good reason, excuse a qualified juror from sitting on the panel in a criminal case; and this will not be error, if the defendant is tried by a jury of lawful men.

IDEM. — A party on trial is entitled to a lawful jury, but is not entitled, as a matter of absolute right, to have the first juror who is called and possesses all the statutory qualifications, sit in his case.

APPEAL from the District Court, Third Judicial District, Monterey county.

The defendant was indicted for the crime of murder, and convicted of murder in the first degree, and sentenced to be executed. He appealed from the judgment.

The other facts are stated in the opinion of the Court.

J. J. Papy, *G. M. Crane*, and *S. F. Geil*, for Appellant.

Is that subdivision prescribing the qualification of jurors constitutional? and if constitutional, has the Court the power to ignore it?

There is nothing in the Constitution prohibiting the passage of the proviso, and in all things not prohibited the power of the Legislature is as unlimited as that of Parliament. (Dwar. on Stat., Chapter XII., sec. 40; People *v.* Bigler, 5 Cal. 27; Calder *v.* Bull, 3 Dall. 386.) Article IV. of the Constitution says, after dividing the government into departments: "And no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others." Where, then, does the Court derive its authority to negative the law? (Mc-

[1] Cited, People *v.* Manahan, post 72.

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Cauley *v.* Brooks, 16 Cal. 40.) Can the Judge excuse
[41] *jurors accepted by the defendant because he chooses to do so? The defendant could not be deprived of his rights by the mere volition of the Judge. (People *v.* Beatty, 14 Cal. 566.)

Attorney-General, for the People.

A conclusion leading to absurd results must not be adopted in construing the proviso to the Jury Law. (In Matter of Hedley, 31 Cal. 108; People *v.* King, 28 Cal. 214.) The only reasonable construction of the first section of the Jury Law, as applicable to Monterey county, is to drop the third subdivision when reading it.

By thus reading it, jurors must have the qualifications required in the first, second, and fourth subdivisions. But must they not have something else? Must they not be able to comprehend the language of the Court and counsel? The general law is, that the proceedings of Courts must be in English. (1 Bish. Cr. Pro. 165.) But there is an express law on the subject, applicable to Monterey county. If the proceedings were all in English there, it would contribute to justice to have the jurors understand that language. If they are had in the Spanish language, the jurors should understand that language. Should not, then, the Court be allowed to impanel such jurors as understand the language in which the proceedings of the case are had?

By the Court, SAWYER, J.:

The trial of this cause was had in the county of Monterey. The Court in impaneling the trial jury, of its own motion, excused six jurors on the ground that they were "ignorant of the language in which the proceedings of the Court are carried on." To this action of the Court the defendant excepted. The ruling is assigned as error, and is the only one relied on to reverse the judgment.

The first section of the "Act concerning Grand and
[42] Trial *Jurors," of 1863, (Stat. 1863, p. 630,) as amended by the act of 1864, (Stat. 1864, p. 462,) prescribes the qualifications of jurors. The third clause requires a juror

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to be one "who has sufficient knowledge of the language in which the proceedings of the Courts are had; provided, that the requirements of this third subdivision of section one shall not apply to the counties of Monterey, San Luis Obispo," etc. If force is to be given to this provision according to the letter, ignorance of the language in which the proceedings of the Court are had is not an absolute disqualification for a juror in the county of Monterey; and a challenge on that ground would not, as a matter of right, be sustained. If the jurors were not absolutely disqualified, it is claimed that the Court, of its own motion, had no right to reject jurors on the ground stated, and that having rejected six on that ground, there was error which entitles the appellant to a new trial. On the other hand, it is claimed, firstly, that to give the proviso a literal construction would lead to absurd consequences, and that such a construction is therefore inadmissible; secondly, that admitting the jurors rejected not to be disqualified under the statute, yet it does not follow that the Court, to avoid the inconvenience which would arise from having several different jurors speaking as many different languages, but not understanding the language in which the proceedings are had, might not properly, in the exercise of a sound discretion, reject those ignorant of the latter language; thirdly, that the defendant is only entitled to an impartial jury, and, if he is tried by such a jury, he could not be injured, and has no right to complain that some other particular juror, though competent, was excused.

It cannot well be said that the Legislature did not mean anything by adopting the proviso in the third subdivision; for the section, as it before stood, contained all the other provisions, and the act seems to have been amended for the express purpose of introducing the proviso. It is well known that in some of the counties in the southern part of the State, including most of those named in the proviso, a large portion of the population are ignorant of the English language, in which the *proceedings of the Courts are [43] ordinarily had, although in some of them the proceedings are authorized to be had in either the Spanish or English language. In those counties it was probably found difficult

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to obtain jurors who were acquainted with the English language, without restricting the choice to limits too narrow, or imposing the burden of jury duty on a small portion of the citizens only. It was, doubtless, in view of this state of things that the proviso was added, so far as the counties named are concerned. But because ignorance of the language in which the proceedings are had is not absolutely a general disqualification, it does not follow that it was contemplated, that in all cases, where a juror is presented possessing all the other qualifications, he must necessarily be taken by the Court, however ignorant he may be of the language in which the proceedings are to be had. Such a construction would certainly lead to absurd consequences. Let us see how it might work: In the county of Monterey, "every written proceeding in a Court of Justice * * * shall be in the English language." (Judiciary Act, Stat. 1863, p. 345, sec. 87.) This is a criminal action, and the Court in a criminal action is required to charge the jury as to matters of law (Cr. Pr. Act, secs. 362, 399); "and in no case shall any charge or instructions be given to the jury otherwise than in writing, unless by mutual consent of the parties." (Id. sec. 362.) The charge, then, is "a written proceeding," and in Monterey county must be in writing, and in the English language. "No person shall be suffered to speak to the jury on any subject connected with the trial." (Id. 491.) When the jury retire to consider their verdict "the officers shall be sworn * * * to suffer no person to speak to them [the jurors,] nor speak to them themselves, on any subject connected with the trial," etc. (Id. 393.)

In this case, it does not appear what language the rejected jurors speak, but, from their names, it is quite evident that five of them speak the Spanish and one the German language. From the character of the population of this State it might well be so, or they might respectively have spoken [44] Spanish, *German, French, Italian, and Russian. Suppose there were two or more languages besides the English, it would manifestly be impracticable to carry on the proceedings. An interpreter for each language would be required, and the testimony of each witness would have to be

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interpreted as many times as the number of languages represented—in this case probably twice, at least, and it may be three times. It might be difficult, and even impossible, to find interpreters. At all events, it would be a great obstruction to the proceedings of the Court, and open the door to errors and misunderstandings innumerable. The law, however, provides for interpreters of the testimony of witnesses. But, when the testimony is closed and the cause submitted to the jury, how are the jurors, each speaking a different language, to compare views in the jury room? We know of no law authorizing the employment of interpreters. It would be difficult, if not impossible, to properly conduct trials with a jury so constituted; and to hold that the Legislature intended that every person otherwise competent, and not objected to by either party, must be taken as a juror without reference to the language he speaks or understands, would be to suppose an intention to adopt an impracticable rule. Such a construction of the act would lead to absurd consequences. This view would not necessarily deprive the act of all operation. For, in the counties named, it might not be difficult to obtain a jury, all of whom speak the same language. At one time a jury speaking the Spanish language might more readily be made up, and at another time one speaking English, German, or French; and the Court, in the exercise of a sound discretion, under the circumstances of each case, would determine which language the juror must understand.

We are not aware that it has ever been settled, that a defendant, under all circumstances, is entitled to have a judgment reversed, where the Court, of its own motion, against his objection rejects a juror possessing all the statutory qualifications. If a juror not possessing the requisite qualifications is allowed to sit against the objections of a defendant, the *judgment will be reversed, because he [45] has not been tried by a lawful jury. But a qualified juror may be rejected, and still a jury of lawful men, against whom there is no objection, may be obtained. A party is entitled to a lawful jury, but no decision has been brought to our notice to the effect that under all circumstances he is,

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as a matter of absolute right, entitled to have the first juror called who has all the statutory qualifications.

This precise question was raised in United States *v.* Cornell, 2 Mason, 91. The juror was held to have been properly excluded, but Mr. Justice Story, in concluding the discussion of the point, said: "Even if a juror had been set aside by the Court for an insufficient cause, I do not know that it is matter of error, if the trial has been by a jury duly sworn and impanelled, and above all exceptions. Neither the prisoner nor the Government in such a case have suffered injury." (P. 106.)

In Montague *v.* Commonwealth, 10 Gratt. 767, the same point arose, and the judgment was reversed because a juror was excused without any good reason; but the Court say: "And it seemeth to the Court that in case of necessity, and to prevent a failure of the ends of justice, it is also competent for the Court to excuse or set aside a juror who, although *free from any statutory disability, and possessing the legal qualifications of a juror* and standing indifferent between the commonwealth and the accused, *is yet disabled, physically or mentally, by disease, mental afflictions, ignorance of the vernacular tongue*, loss of hearing, or other like cause, from properly performing the duties of juror; and this of its own motion, without the suggestion or consent of either party; but that the power of so doing is to be exerted with due caution and circumspection, and in the exercise of a sound discretion, for the same purposes and upon the same grounds and principles which govern the Court in the exercise of its discretion to discharge a jury sworn in a criminal case before they shall have rendered a verdict; the former power being in effect but a corollary from the latter, which has been confirmed by a statutory provision." (P. 772.) In this case, *ignorance of the vernacular tongue* is [46] *regarded by the Court as sufficient to justify a Judge in rejecting a juror, yet it does not appear that such ignorance was an absolute legal disqualification. No statute is referred to making it such, and the Court is speaking of persons "free from any statutory disability." We are not aware that such ignorance would

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be a legal disqualification anywhere unless made so by express statute. Yet there can be no doubt that, independent of any provision on the subject, a Judge would be justified in excusing a juror on that ground.

In Tatum v. Young, (a civil case,) 1 Port. 298, a competent juror was excluded against the objection of the defendant, and this ruling was assigned as error; and on the argument the respondent's attorney challenged the opposite party "to show a single case in all the books where a verdict has been set aside merely because a juror was rejected that might legally have served" (303); but none was produced. The Court, in deciding the case, say: "It is a general rule that neither party can claim any advantage from any decision, or other matter having no tendency to prejudice him. Where a cause has been tried by an unexceptionable jury, the law presumes no injury to either party for want of any other person in lieu of those composing that jury. Should it happen, as supposed in argument, that a Judge, from political or other unworthy motives, might at some time reject jurors to effect some sinister or criminal design, and the circumstances disclose a probable injury to either party, the question on error might be essentially different," etc. (309.) After citing Mr. Justice Story's observations from 2 Mason, the Court say: "We are of opinion that this rejection of the juror, under the circumstances of the case, is not a matter available in error" (310.) In Commonwealth v. Hayden, 4 Gray, 19, one of the jurors requested to be excused because he lived in the same town with the defendant. In answer to questions from the Judge, the juror said he had not formed or expressed any opinion in regard to the case, nor had he any interest or bias in relation thereto. The Judge said the reason assigned "was not of itself a sufficient excuse; but, in the exercise of his discretion, *directed the juror to leave [47] the panel and a supernumerary to take his place. The defendant objected, and contended that as that juror was unprejudiced and not disqualified, the defendant was entitled to be tried by the panel as alphabetically arranged" (19.)

On appeal, the Court say: "In the third of these cases (Hayden's) we have no doubt that it was within the authority

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of the Court, in its discretion, to excuse the juror for the reason assigned, although he was not legally incompetent to sit in the trial." (21.) In Georgia, neither deafness nor sickness is, under the statute, a disqualification for serving on a jury, but the Court may discharge a juror on these grounds without consulting the prisoner. (Jesse *v.* State, 20 Geo. 164.) In State *v.* Arthur, 2 Dev. & B. 221, the Court say: "Every Court has, as we apprehend, the power, of its own motion, to cause to be withdrawn from the jury those whom it believes not qualified to discharge the duties required from jurors. * * * But when the Court is thus acting for its own satisfaction, it does not adjudicate between the parties. Neither can assign for error that one of the panel has been withdrawn by order of the Court without adequate cause." (See also People *v.* Ferris, 1 Abb. Pr. N. S. 197; Stewart *v.* State, 1 Ohio St. 68; Pierce *v.* The State, 13 N. H. 555; Thomas *v.* State, 27 Geo. 295.) Thus, it appears, in many instances, parties not positively disqualified under the law, yet, in fact, not qualified or fitted to discharge the duties of jurors in the given case, and in some cases where there was really no sort of objection, Courts have discharged them in the exercise of their discretion, and their action has been affirmed on appeal. No case to the contrary, other than as cited, has been brought to our notice.

In all the counties of this State but six, a want of sufficient knowledge of the language in which the proceedings are had, is an absolute disqualification. In those six counties, such want of knowledge of the language is not a legal disqualification which entitles a party to have a juror excluded, but still, it is for the Court to say, under the circumstances ex-
[48] isting at *the time, whether it is proper that a party ignorant of the language should be excused. If there are parties summoned as jurors, speaking two or more different languages, who cannot communicate with each other, it is obviously improper that they should sit together upon the same jury. There would be no means by which they could communicate with each other in the jury room.

In this case, there is no complaint that the defendant was not tried by a jury of good and lawful men; and, while we

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do not say that a judgment would not be reversed, where a Court arbitrarily or wilfully rejects a juror not disqualified under the provisions of the statute, without any reasonable ground upon which to base its action, yet, in this case, there is some reasonable ground for the action of the Court, and there is nothing disclosed in the record to show that the discretion of the Court was not soundly exercised.

Judgment affirmed, and District Court directed to appoint a day for carrying the judgment into execution.

IN THE MATTER OF J. B. BROWN.

COMMITMENT TO PRISON.—No other authority or warrant for the detention of a prisoner is required than a certified copy of the judgment rendered against him.

SENTENCE ON PLEA OF GUILTY OF MURDER.—If a defendant pleads guilty to an indictment for murder which does not specify the degree, and the Court imposes a sentence of confinement in the State Prison, the judgment is not a nullity, for the presumption is that the Court by testimony ascertained the degree of the crime.

APPLICATION to the Supreme Court for discharge on habeas corpus.

I. S. Brown, for Petitioner.

Attorney-General, against the discharge.

*By the Court, SHAFTER, J.: [49]

It appears by the return that the confinement of the petitioner in the State Prison is by virtue of a certified copy of a judgment rendered against him on a plea of "guilty" to an indictment for murder, by which judgment the petitioner was sentenced for said offence to twenty years' imprisonment. No other authority or warrant for the detention of the prisoner is required by law than such certified copy. We held In the Matter of Edward Ring, 28 Cal. 247, that the offence of which a person accused of crime had been convicted should be stated in the entry of the judgment; but the counsel is

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mistaken in supposing that the judgment against the petitioner does not conform to this requirement.

It is urged that as the indictment was for murder without any specification of degree, that the plea of guilty was of murder in the first degree—a capital offence—and that the sentence, therefore, is a nullity upon its face. But under the twenty-first section of the act relating to crimes and punishments, "if a person indicted for murder shall be convicted on confession in open Court, the Court shall proceed by examination of witnesses to determine the degree of the crime, and give sentence accordingly." We must intend that this rule was observed by the Court on the conviction of the petitioner upon confession, and that the Court, on the testimony submitted, determined the offence to be murder of the second degree, and sentenced accordingly.

The prayer of the petitioner must be denied, and it is so ordered.

HENRY BLAIR *v.* JAMES H. HAMILTON.

[1] RETURN OF FACTS ON CERTIORARI.—When a case is brought from an inferior Court or tribunal to the Supreme Court by certiorari, if all the facts upon which the Court below acted are not in the record, the Supreme Court may require the Court below to certify such facts.

[50] *IDEM.—The return of a finding of facts made by a County Judge to a writ of certiorari, constitutes a part of the record within the meaning of the four hundred and sixty-third section of the Practice Act, though the finding is not made until the next term after the testimony is taken and the order or judgment based on it is made.

[2] SURETIES ON APPEAL BOND.—A party who excepts to the sufficiency of sureties on an appeal bond may waive their justification.

WAIVER OF JUSTIFICATION OF SURETIES.—If the sureties on an appeal bond are excepted to and appear before the Justice to justify, and the party excepting then states before the Justice that he knows the sureties to be good, and only excepted because his attorney told him to do so, this is a waiver of justification.

[3] EVIDENCE OF WHAT OCCURRED BEFORE JUSTICE.—When a question arises in the County Court on an appeal from a Justice's Court, as to the jurisdiction of the

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[1] Cited, in dissenting opinion, C. P. RR. Co. *v.* Placer Co., 585; S. C. 34 Cal. 362.
[2] Cited, Murdock *v.* Brooks, 38 Cal. 603.
[3] Cited, Jolley *v.* Foltz, 34 Cal. 328.

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County Court, the County Court may take testimony outside the record transmitted by the Justice as to what occurred after filing the undertaking and notice of appeal, and may also take testimony as to what occurred before that time, if the Justice has omitted to make the requisite entries in his docket.

JUSTICE'S DOCKET AS EVIDENCE.—A Justice's Docket is only primary evidence, and its omissions may be supplied from other sources when necessary.

CERTIORARI to the County Court of Sacramento County.

The facts are stated in the opinion of the Court.

M. C. Tilden, for Petitioner.

James W. Coffroth, for Respondent.

By the Court, SANDERSON, J.:

This action was brought in the Court of a Justice of the Peace in Sacramento County, was tried, and final judgment rendered for the defendant. Thereafter, and within the time prescribed by law, the plaintiff took an appeal, by filing and serving a notice of appeal in all respects sufficient in law, and in due time thereafter filing a bond in due form. Within five days after the filing of the undertaking, the defendant excepted to the sufficiency of the sureties, as provided in the six hundred and twenty-eighth section of the Practice Act. The sureties did not justify before the Justice upon notice to the adverse party within five days thereafter, as provided in the section already cited. Nevertheless, the Justice transmitted the case to the County Court, and it was placed upon the calendar of that Court for trial. Thereupon, the defendant moved *the Court to dismiss the appeal, [51] upon the ground that the failure of the sureties to justify, on notice, rendered the undertaking inoperative, and left the appeal without the support of an undertaking, or, in the language of the statute, "as if no undertaking had been given." This motion was based upon the notice of the defendant excepting to the sufficiency of the sureties, accompanied by an affidavit of the defendant showing service of the notice and the subsequent action of the Court and the parties in the premises. According to this affidavit, the notice was left by the defendant with the Justice, to be served by him

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on the plaintiff, and the Justice served the same, with a further notice that he would take the justification of the sureties at a certain time therein specified; that the plaintiff and defendant appeared before the Justice at the time appointed, and that the Justice then asked the plaintiff if he declined to have his sureties justify, and he replied that he did, stating in addition that he would not ask his sureties to come up there any more, and that he had done all he intended to do in reference to the undertaking; that the defendant was never notified that the sureties would justify, and that they never did justify; and further, that the plaintiff never filed any other undertaking in lieu of the one to which exception was taken.

Neither the notice of appeal nor the undertaking had been indorsed as filed by the Justice, but the entries in his docket showed the dates at which they were respectively deposited with the Justice. The Court ordered the Justice to indorse them as filed of the dates respectively, as entered in his docket, and denied the motion. It appears from the recitals in the order of the Court denying the motion to dismiss, that the Justice and the defendant were examined as witnesses touching the questions of fact involved in the motion, but the Court did not at that time draw up any finding. Subsequently, however, but at the next term, the Court prepared a finding of facts, with conclusions of law, and ordered it to be filed in the case as of the date at which the motion had been heard.

The finding is in substance that after the plaintiff [52] had been *served with the notice of the defendant excepting to the sureties, he produced one of them before the Justice, the other being within call, for the purpose of having them justify. That thereupon the Justice, of his own will, in the presence of the defendant, refused to swear the sureties on the ground that both he and the defendant knew them to be good. That the defendant assented to this, saying that he knew them to be good, and that he only served the notice requiring them to justify because his attorney had prepared it and directed him to do so. And that thereupon the parties all left without any justification being taken. In view of these facts, the Court held that defendant had waived a

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compliance with his notice on the part of the plaintiff, and so denied the motion to dismiss.

The case has been brought here by certiorari, and we are asked to reverse the order and dismiss the appeal upon the ground that the Court below has exceeded its jurisdiction.

It is first insisted on the part of the defendant that in passing upon the question before us no resort can be had to the finding of facts, upon the ground that the same constitutes no part of the record, for the reason that it was not prepared and filed until the next term of the Court, at which time, as is claimed, the Court had lost all jurisdiction of the case. If the finding be disregarded the result would be the same, as will presently appear; but were it at all necessary that we should be put in possession of the facts in view of which the Court below acted, and which are not technically of record, it would be competent for this Court to require the Court below to certify such facts in its return to the writ. In many cases jurisdictional facts may not appear of record, either by failure of the inferior Court or officer to follow the requirements of the law and make them of record, or because the law itself does not require it to be done. In such cases this Court, and all other Courts having jurisdiction to review and correct the proceedings of inferior Courts, would be powerless, unless it can compel the inferior tribunal to certify to this Court, not only what is technically denominated the record, but such *facts, or the evidence of them, as may be neces- [53] sary to determine whatever questions as to the jurisdiction of the inferior tribunal may be involved, and the grossest abuses of power, to the great reproach of the law, might be perpetrated with impunity and without the possibility of a remedy. But we need not dwell upon this point, for it has been directly decided in the case of Whitney *v.* Board of Delegates, 14 Cal. 479, and Lowe *v.* Alexander, 15 Cal. 300. Were it necessary, therefore, for the proper disposition of this case, that we should be put in possession of the evidence received by the Court below, or the facts in view of which it determined the question of jurisdiction, this Court would have required that Court to certify the same, (sec. 463,) and hence being here there can be no question as to

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their being a part of the record within the meaning of the four hundred and fifty-ninth section of the Practice Act. But, as already intimated, the finding is not indispensable to a proper disposition of the case, for the record itself, aside from the finding, shows that the Court acted in view of facts not disclosed by the record, which was sent up by the Justice, and the presumption would be that those facts were such as to support the judgment of the Court.

That the facts show a waiver on the part of the defendant of a justification on the part of the sureties, does not admit of argument. To hold otherwise would enable the defendant to take advantage of his own wrong. Nor does the capacity of the defendant to make the waiver admit of debate. A party may waive the performance of an act intended for his benefit and security. He might have waived a bond altogether, an act which is frequently done, much more a justification of the sureties. But it is claimed that the County Court had no power to take testimony outside of the record which was transmitted by the Justice, and this brings up the only substantial question involved in the case.

In taking this position, counsel overlooks the fact that he convicts himself of a solecism, for in laying a foundation for his motion he, by implication at least, asked the Court [54] to do *the very thing of which he now complains. There was nothing in the record which was sent up to the County Court bearing upon the question of the justification of the sureties, except the bald notice of the defendant that he excepted to them, which had been filed by the Justice as a paper in the case. There was nothing to show that it had ever been served upon the plaintiff. Hence, in order to make the question with which the County Court dealt and which we are reviewing, counsel was compelled to go outside of the record and make proof of a material fact. On the face of the record as it came up, the County Court would have been compelled to hold that the notice had never been served, and that therefore the plaintiff had never been put upon the justification of his sureties, and hence that the appeal had been perfected according to law. If it was competen for the defendant to offer evidence of facts *dehors* the record, for the

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purpose of showing a want of jurisdiction, it was for the same reason competent for the plaintiff to do the like, for the opposite purpose.

At the argument, we were under the impression that the facts of which proof was made in the County Court were required to be entered in the Justice's docket, and hence there might be some ground for claiming that his docket was the only evidence to which the Court could look, but upon an examination of the statute we find that such is not the case. (Sec. 604.) The last acts which the Justice is required to enter in his docket are the filing of the notice of appeal and the appeal bond. Of the subsequent proceedings he is not required to keep a record—from which it results that when subsequent proceedings are had and it becomes material for any purpose to ascertain what they were, a resort must be had to extrinsic evidence. But were it otherwise, and the Justice should omit to make the requisite entries, the result would be the same, for the record kept by the Justice is not the only evidence of what was done. The statute only makes the docket primary evidence—from which it follows that its omissions may be supplied from other sources when it becomes necessary. (Sec. 605.)

*Doubtless, in cases like the present, the more reg- [55]
ular course would be for opposing counsel to suggest the absence of material facts, and ask the Court for an order upon the Justice to certify the same fully, but we see no fatal objection to the course which was pursued in this case. The Justice was called as a witness, and the facts ascertained in that way.

It results that the County Court did not err in receiving extrinsic evidence, or in the legal conclusion which was reached.

The order denying the motion to dismiss the appeal is affirmed.

SAWYER, J., concurring specially:

I concur in the judgment.

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JAMES HILL v. T. L. GRIGSBY, AND J. W. SMITTLE.[1]

[2] ATTACHMENT.—The vendor of real estate cannot take out an attachment for unpaid purchase money, if he can enforce a lien for such purchase money. It matters not whether such lien is one which Courts of equity will enforce in favor of a vendor, or whether it is one created by contract.

LIEN OF VENDOR.—The vendor of real estate has a lien on the same for the unpaid purchase money, and such lien attaches to the land equally whether it has been conveyed to the vendee or is only contracted to be conveyed.

WHEN ATTACHMENT CANNOT ISSUE.—An attachment cannot issue when the plaintiff has a lien to secure his debt, and it matters not whether the lien is one recognized by Courts of equity or is one of statutory origin and resting in contract.

IDEM.—If the plaintiff has a lien to secure his debt on property out of this State, an attachment cannot issue.

LAWS OF ANOTHER STATE.—In the absence of proof on the subject, the presumption is that the laws of another State are the same as those of this State.

APPEAL from the District Court, Seventh Judicial District, county of Napa.

The plaintiff appealed from an order discharging the attachment.

The other facts are stated in the opinion of the Court.

Rayle & Pendegast, for Appellant.

[56] *The mortgage, lien, or pledge, mentioned in section one hundred and twenty of the Practice Act, the existence of which permits the issuance of an attachment, is a legal mortgage—a conveyance of lands by the debtor as a security for the debt. It is a solecism to say that plaintiff has a lien on the property and at the same time is invested with the legal title. When the statute says "mortgage," it means a mortgage founded on contract. In this case, there was not even an equitable "mortgage." Bouvier says: "An equitable mortgage of land is where the mortgagor does not convey regularly the land, but does some act by which he manifests his determination to bind the same for the security of a debt. An agreement in writing to transfer an estate as a security for the payment of a sum of money borrowed, or

[1] Same case, 35 Cal. 656.

[2] Approved, Porter v. Brooks, 35 Cal. 202.

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even a deposit of title deeds and a verbal agreement will have the same effect of creating an equitable mortgage." (2 Bouv. Law Dic. 190; 1 Rawle, 328; 3 Wheat. 284; 1 Cox, 211.) The bond in question contains none of the elements of an equitable mortgage. The case of Sparks *v.* Hess, 15 Cal. 188, is not in point, for in that case there was a written agreement signed by the respective parties. Here the bond was signed by appellant alone, and for the sole benefit and indemnity of respondents. It is not a case of dependent covenants or mutual stipulations. Appellant has the right to sue at law upon the notes. Has he not then the legal right to invoke the statutory remedy by attachment? The obligation to pay the notes is absolute and unconditional and independent of the bond.

If the notes in suit are to be regarded as having been made in the State of Nevada, then the lien must depend on the laws of that State. Judge Story, in his Conflict of Laws, section four hundred and twenty-four, says: "And here the general principle of the common law is that the laws of the place where such property is situated exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them." (14 Ves. 541; and Elliott *v.* Lord Mento, 6 Madd. 16.) From this doctrine *it is obvious that the Practice Act of this [57] State, in respect to attachments, cannot be made to apply to liens, express or implied, upon real estate situate in a foreign State.

C. Hartson and *T. J. Tucker*, for Respondents.

Appellant was a vendor of real estate, who had retained the legal title as security for the purchase money. As such he had a vendor's lien. (Gouldin *v.* Buckelew, 4 Cal. 107; Sparks *v.* Hess, 15 Cal. 192; Taylor *v.* McKinney, 20 Cal. 618.) A lien is simply a right to possess and retain property until some charge attaching to it is paid or discharged. The vendor is treated in equity as the equitable owner of the land. The statute uses the most comprehensive terms to embrace every species of security, viz.: "Any mortgage, lien, or pledge on real or personal property." This includes every lien,

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whether existing in or out of the State, or whether a lien created by contract or operation of law.

By the Court, RHODES, J.:

Appeal from an order of the County Judge discharging an attachment. It appears from the papers on which the motion was based, that the plaintiff sold to the defendants, Grisby and Smittle, the undivided half of a quartz mill and certain real estate situated in the State of Nevada, for the sum of eighteen thousand dollars; that the plaintiff executed to the defendants a bond conditioned for the conveyance of the property, upon their making payment of the purchase money; that the promissory notes in suit were given by the defendants for a part of the purchase money; that the bond was executed and delivered by the plaintiff to Grigsby, in this State; that at the same time Grigsby signed the notes and delivered them to the plaintiff; that Smittle executed and delivered the notes to plaintiff in the State of Nevada. The notes are dated at Washoe City, in the State of Nevada, but no place of payment is specified either in the notes or in the bond. The premises have [58] not *been conveyed to the defendants. The attachment was levied on the property of Grigsby. Smittle was not served with process, nor was any property of his attached.

Grigsby moved to discharge the attachment on two grounds: first, because the notes were secured by a lien upon real property; second, because the notes were made and payable in the State of Nevada. The motion to discharge the attachment was sustained on both grounds.

It is provided by section one hundred and twenty of the Practice Act that an attachment may issue: "First, in an action upon a contract express or implied for the direct payment of money, which contract is made or is payable in this State, and is not secured by a mortgage, lien, or pledge upon real or personal property; or, if so secured, that such security has been rendered nugatory by the act of the defendant." The defendant claims that the plaintiff holds a vendor's lien upon the premises sold, which serves as a security for the payment of the purchase money.

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It is a familiar doctrine of Courts of equity that the vendor of real estate, after an absolute conveyance, retains a lien for the unpaid purchase money; and Judge Story says: "This lien of the vendor of real estate for the purchase money is wholly independent of any possession on his part, and it attaches to the estate as a trust equally, whether it be actually conveyed or only be contracted to be conveyed." (2 Sto. Eq. Jur. sec. 1218.) The question is very fully considered by Mr. Chief Justice Field, in Sparks *v.* Hess, 15 Cal. 192, which was a suit to enforce the vendor's lien, the contract of sale remaining unexecuted. It was there said, after defining the character of the lien held by the vendor after a conveyance, and holding that the vendor, when the contract of sale remained unexecuted on his part, also possessed a lien: "In the present case the vendors have retained the legal title, and evidently as security for the purchase money. Their position is in most respects similar to what it would have been had they executed a conveyance to the vendee and taken from him a mortgage upon the property. A mortgage is in form a conveyance of *the legal title, though intended only [59] as a security for the debt. Here the title is retained by the vendors for a similar purpose of security." In Salmon *v.* Hoffman, 2 Cal. 138, the vendee sought a rescision of the contract of sale, but the Court held that the vendors were entitled to their equitable lien for the payment of the purchase money. The same doctrine was announced in Truebody *v.* Jacobson, 2 Cal. 269; Gouldin *v.* Buckelew, 4 Cal. 111; Ellis *v.* Jeans, 7 Cal. 415; Taylor *v.* McKinney, 20 Cal. 618; Baum *v.* Grigsby, 21 Cal. 177; and Willis *v.* Wozencraft, 22 Cal. 617. The point was directly involved in a part, though not in all of those cases; and although it may be a matter of regret that the Court had not adhered to the easy and plain rules of the Statute of Frauds, the doctrine may now be regarded as firmly settled in this State, so far as it depends on the action of the Courts.

The vendor's lien constitutes a lien within the words of section one hundred and twenty. But the plaintiff insists that the lien contemplated by the statute is one of "statutory origin and resting in contract," and not one "known only to

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and recognized by Courts of equity." It is sufficient to say, without considering the origin or elements of a vendor's lien, that the statute has made no specification of the character of the liens necessary to fill the requirements of the section, and the Court is not authorized to make any discrimination in favor of or against any particular kind of lien.

It is further objected that the property on which the lien rests is not within the State. The statute has not declared the limitation suggested by counsel, and no sufficient reason occurs to us why the restriction should be made. A lien is none the less a security because the property covered by it is without the jurisdiction of the Courts of this State, and it may be equally or more valuable to the creditor there than it would be if the property were in this State. The policy that seems to have dictated the statute is that the creditor, having a security for his debt by way of a mortgage, lien, or
[60] pledge, *should not be entitled to the further security afforded by an attachment.

In conclusion, it is proper to say that the presumption, in the absence of proof on the subject, is that the laws of Nevada, in respect to the vendor's lien, are the same as those of this State. (Norris *v.* Harris, 15 Cal. 226; Hickman *v.* Alpaugh, 21 Cal. 225.)

Order affirmed.

THE PEOPLE *v.* JIM TI

[1] INDICTMENT FOR LARCENY.—If an indictment for stealing money fails to describe the money with sufficient particularity, the objection should be taken by demurrer, and if not so taken is waived.

LARCENY FROM SERVANT.—If property is stolen while an employé of the owner has charge of it, and another person is charged with the larceny, the prosecution are not bound, on his trial, to call as a witness such employé.

CONFESSION OF CRIME.—Confessions which are entirely voluntary when made, are admissible in evidence, even if, on a prior occasion, some promise of favor not acted upon, and which had ceased to be operative, had been made to induce the accused to confess.

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[1] Explained, People *v.* Cox, 40 Cal. 277.

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CONFESSIONS IN EVIDENCE.—The question as to the admissibility of confessions is one for the exercise of a sound judicial discretion, to be guided by the circumstances of each particular case.

MONEY STOLEN.—On a trial for a larceny of gold and silver coin, the identity of the money stolen with that found on the defendant is a question of fact for the jury.

[1] NAME IN INDICTMENT.—If a defendant is indicted by a wrong name, and so states when asked, and gives his true name, the true name may be substituted, and subsequent proceedings had in the true name.

APPEAL from the County Court, Sierra county.

The defendant was employed as a porter by one Mearny, a saloon keeper at Downieville, Sierra county. Mr. Mearny left his saloon in charge of his barkeeper late Saturday evening, and did not return until eleven o'clock A. M. the next day. When he left, he placed a tin box, containing two hundred and thirty-five dollars and seventy-five cents in gold and silver coin, in his safe. The key of the safe was in a sugar bowl. When he returned the next morning, the tin box had been *taken out of the safe and placed under [61] the counter, but the money was gone. The defendant was arrested and confined in jail. The constable went to the defendant's house the same day, and defendant's wife gave him a purse containing between seventeen and eighteen dollars. The constable went into a shed back of the house, and found a rice jar sitting on the ground. Upon removing it, he saw that the ground had been disturbed under it, and upon digging found an oyster can containing two hundred and nineteen dollars and some cents. When defendant was first arrested, and before he was placed in jail, and before the money was found, the constable took him into the saloon, and Mr. Mearny made him the first promises if he would confess.

In the latter part of the day, and after the money had been found, Mr. Mearny went to the jail and saw the defendant, who then made the confession that he took the money and was a fool to do it. On the Monday following, the defendant made the confession before the Justice. The money found in

[1] Cited, State v. Burns, 8 Nev. 256.

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the ground and that given up by the woman contained about the same number of twenty dollar gold pieces as were stolen. The indictment described the money as "gold and silver coin, the personal goods of N. H. Mearny, of the value of two hundred and thirty-five dollars and seventy-five cents." The defendant took the objection that the description of the money in the indictment was insufficient, on motion for a new trial and in arrest of judgment.

On the trial, the barkeeper was not called as a witness, nor did the record show any reason why he was not called. The defendant was convicted, and appealed.

The other facts are stated in the opinion of the Court.

James A. Johnson, for Appellant.

The barkeeper might have taken the money and given it to the defendant, and without his testimony the defendant should not have been convicted. To convict the defendant without the barkeeper's testimony is to assume that he actually stole the money. (Barb. Cr. Law, 182–3.) The description [62] *in the indictment is insufficient. (People *v.* Ball, 14 Cal. 101; People *v.* Green, 15 Cal. 512.) The Court erred in admitting the confessions of defendant. (Barb. Cr. Law, 459; State *v.* Phelps, 11 Vt. 116.)

Attorney-General, for the People.

The record does not show that the failure to call the barkeeper was made a point below. He may not have known anything about the matter, or may have been dead. The confession was voluntary, and this was sufficient to send the case to the jury. The rule laid down in Barbour, if applicable to the facts of this case, is not well founded in principle. (2 Bish. Cr. Pro., secs. 385, 707.) The objection that the indictment did not sufficiently describe the money should have been taken by demurrer. (People *v.* Josephs, 7 Cal. 129; People *v.* Ball, 14 Id. 101; People *v.* Shotwell, 27 Id. 394; People *v.* Garnett, 29 Id. 622.) The fact that the money had been taken by some one was proved by other testimony than the confession. This is all that the rule requires. (1 Bish. Cr. Pro., secs. 500, 501; People *v.* Linn, 23 Cal. 151.)

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By the Court, SAWYER, J.:

The objection to the indictment, that the money stolen is not described with sufficient particularity, should have been taken by demurrer. The objection to the sufficiency of the description was not taken in the mode prescribed, and came too late. (People *v.* Shotwell, 27 Cal. 401; People *v.* Garnett, 29 Id. 626.) The facts charged are sufficient to constitute an offence.

The evidence presented by the people was sufficient to sustain the verdict—to prove the taking as well as the felonious intent—and it is no objection that the people did not call the barkeeper, either on the ground that his testimony might have made the case stronger or weaker. If the defendant supposed the case of the people might have been weakened by *the testimony of the barkeeper, he was himself at liberty to call him. [63]

Before the money was found, the owner charged the defendant with the larceny, and told him if he would return the money, or tell him where it was, he would let him go, but if he would not he would have him put in jail. Defendant denied any knowledge of the theft, and said the owner could put him in jail, or cut his throat, but that he could not tell him anything about it. He was arrested and committed to jail. Subsequently, after the money had been found secreted at defendant's residence, and defendant's wife had also been arrested and committed to jail, and while he was in jail, the prisoner was again asked by the owner if he took the money, and he answered that "he did, and was a fool to do so." On his examination before the magistrate, he also stated that he "took the money and was a fool for doing so, but that he intended to replace it." These declarations were admitted in evidence under objection, on the ground that some benefit had been held out to him if he would confess before the money was found, and before he had been arrested. Undoubtedly, confessions induced by hope, or fear, based upon promises or threats, must be excluded. Only voluntary confessions of the prisoner are admissible in evidence against him. At the time the declarations admitted in evidence were made, there was

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no threat or promise made. There was nothing at all said by way of inducement, after the conversation before mentioned which was had before the arrest, and before the money had been found. The promise, then, was, if the prisoner would return the money, or tell where it could be found, he would be allowed to go, but if he did not, he would be sent to jail. The promise related to the finding and restoring of the money which the owner was desirous of securing. He refused to tell anything about it, was arrested and committed to jail, and the money subsequently found secreted on the premises occupied by the prisoner. The whole object of the promise, and the conditions upon which it had been made, had been accomplished without defendant's aid; the threatened consequence [64] *of the refusal had transpired by the arrest and committal of the prisoner; the money had been found in his possession, and all hope of escape had passed. Little motive for further denial remained, and no object to be gained, on the other hand, for seeking a confession. The Judge below was of opinion that there was, under the circumstances, no motive of hope or fear induced by the action of other parties, at the time operating to influence the defendant; and that the confession of the taking was voluntary. And this is one of the class of questions upon which the Judge is to exercise a judicial discretion, to be guided by all the circumstances of the case. (1 Greenl. Ev. sec. 219.) We cannot say that the discretion was not in this instance soundly exercised. The testimony corroborative of the declaration was ample, and even sufficient to justify the verdict without it. The question of identity was for the jury to determine on the evidence; and, on this head, there could scarcely be a case of a more satisfactory identification, where the taking is not witnessed by some party, or where the coins have not some special mark by which they could be recognized. The money found corresponds very nearly in the amount and kinds of coin—gold and silver—and there was among the coins stolen and those found an English sovereign—a striking coincidence at this time, when sovereigns, as a circulating medium, are extremely rare.

There is no force in the point made that the defendant was

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indicted under the name of Ah Ki and tried by the name of Jim Ti. The record shows that on arraignmen the prisoner was asked if the name in the indictment was his true name; that he stated his name to be Jim Ti; that his name was substituted in the record, and the subsequent proceeding had in that name, as provided by the statute.

There is no other point sufficiently plausible to require notice.

Judgment affirmed.

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*THE SAN FRANCISCO LADIES' PROTECTION AND RELIEF SOCIETY v. CHARLES R. STORY. [65]

PROPERTY EXEMPT FROM TAXATION.—The property of all asylums and charitable institutions which are supported in whole or in part by the State, is exempt from taxation.

APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

The plaintiff owned real estate in San Francisco, which in 1866 was assessed at twenty-seven thousand dollars. The defendant, who was Tax Collector, enforced the payment of the tax on this sum, which was eight hundred and thirty-seven dollars.

The other facts are stated in the opinion of the Court.

Nathan Porter, for Appellant

Haight & Pierson, for Respondent.

By the Court, SANDERSON, J.:

This is an action to recover a tax paid by the plaintiff to the defendant, who is the Tax Collector of the city and county of San Francisco, under duress and protest. The plaintiff had judgment in the Court below, and the defendant appeals.

The only question upon which we are asked to express an opinion is whether the property of the plaintiff is exempted from taxation by the following language, which is found in the third subdivision of section four of the Revenue Act of

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the 2d April (Stat. 1866, p. 803): "All asylums and charitable institutions supported in whole or in part by the State."

The Court below found as facts, which are also admitted by the appellant, that the plaintiff is a charitable institution, and that the property upon which the tax in question was levied was used by the plaintiff solely for charitable purposes; and that the plaintiff is the same institution which received

[66] *appropriations from the State by virtue of legislative acts in the years 1862, (Stat., p. 435,) 1863, (Stat., p. 521,) 1863–4, (Stat., p. 415,) 1865–6, (Stat., p. 679.)

In view of the foregoing facts and legislative acts, the question whether the property of the plaintiff, which was taxed in this case, is exempt from taxation or not, does not admit of argument.

Judgment affirmed.

Neither Mr. Justice RHODES nor Mr. Justice SHAFTER expressed any opinion.

A. B. BOWERS AND A. C. SWEETSER *v.* BOARD OF SUPERVISORS OF SONOMA COUNTY.

ACT FOR MAP OF SONOMA COUNTY.—The act of the 28th of March, 1863, "to authorize the Board of Supervisors of Sonoma County to appropriate money for a map," is not mandatory on the part of the Board, but leaves the matter to its judgment.

CONSTRUCTION OF ACT.—If an act both authorizes and empowers, and makes it the duty of a Board of Supervisors to contract for a map, it will not be construed as mandatory.

APPLICATION to the Supreme Court for writ of mandate.

The Legislature passed the following act, which was approved by the Governor, March 28th, 1863:

"AN ACT TO AUTHORIZE THE BOARD OF SUPERVISORS OF SONOMA COUNTY TO APPROPRIATE MONEY FOR A MAP.

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. The Board of Supervisors of the county of

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Sonoma are hereby authorized and empowered, and it is hereby made their duty to contract with A. B. Bowers for the completion and publication of his map of said county, and to pay *for the same the sum of five thousand dol- [67] lars, on or before the delivery to them of twenty copies of the aforesaid map.

"SEC. 2. This act shall take effect immediately."

The petition set forth that immediately after the passage of said act, and in pursuance of its provisions, the petitioner, Bowers, commenced the compilation of a map, and on the 8th day of November, 1866, said map was completed and published in pursuance of said act. That on the 14th day of November, 1866, he tendered to said Board twenty copies of said map, and then and there demanded of said Board that they should contract with him for the publication of his map of said county for the sum of five thousand dollars, and that they should receive the said twenty copies tendered as aforesaid, and order a warrant drawn on the Treasurer of said county in favor of the said A. C. Sweetser, for said sum of five thousand dollars, in accordance with the directions and provisions of said act, in full satisfaction and discharge of his claims and demands thereunder. That on the 20th day of June, 1865, for a good and valuable consideration, to wit, to secure the payment of money had and received from the said A. C. Sweetser, to be laid out and expended, and which was laid out and expended on said map, he assigned his interest and claim against said county under said act and contract to the said A. C. Sweetser, and that by reason thereof the said Sweetser became and still is interested in this proceeding and the subject-matter thereof, and therefore joined him in his petition for mandamus against said Board. A motion on behalf of the Board was made to dismiss the petition, on the ground that the act was not imperative, but was merely intended to authorize the Board to contract.

The other facts are stated in the opinion of the Court.

Temple & Thomas, for the Motion.

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Latimer & McCullough, and *Moore & Alexander*, for Petitioners.

[68] *By the Court, SHAFTER, J.:

This is a petition for a mandamus commanding the defendant Board to contract with Bowers for the completion and publication of a certain map of the county of Sonoma. The petition was demurred to.

It appears that the petitioner having "conceived a design of compiling and publishing a topographical map of Sonoma county," applied to the Legislature in March, 1863, for aid, and that thereupon an act was passed, entitled "An Act to authorize the Board of Supervisors to appropriate money for a map." Though the body of the act, so far as the mere letter is concerned, is mandatory, still we are satisfied that it was not the intention of the Legislature to compel the Board of Supervisors outright "to contract" for a map, and to pay him therefor the sum of five thousand dollars. The act contains no description of the size of the map, nor direction as to the style in which it is to be finished and put up. In view of the fact that the Board is authorized *to contract*, etc., we infer that it was the intention of the Legislature to refer the question, to some extent at least, to the better knowledge and judgment of the local authorities. Why should the Legislature have authorized the Board to contract for a map for a given sum, if its purpose was, after all, to force a purchase *in invitum*, without the slightest reference to the judgment and free will of the county officers?

The petition and affidavit are adjudged to be insufficient, and the application is dismissed.

THE PEOPLE *v.* WILLIAM MANAHAN.

GRAND JURY.—If there is more than one person in custody awaiting the action of the grand jury, and out of the grand jurors summoned the first thirteen are impanelled as a grand jury for the term, and three of these have formed an opinion as to the guilt of one of the persons in custody, and are challenged by him for

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that reason, the Court may direct the jury to pass on all the cases except that of the challenger, and summon a special grand jury to pass on his case.

[1] *IDEM.—In such case the Court need not impanel another grand jury to consider the challenger's case, by taking the ten who were qualified, and filling up the remainder of the panel out of the other jurors in attendance who had been summoned; but may in its discretion summon an entire new grand jury. [69]

EVIDENCE AS TO TIME CRIME WAS COMMITTED.—If, on the trial on an indictment[t] for rape, charged to have been committed in January, 1865, the witness by whom the prosecuting attorney expects to prove the crime, in answer to his question whether at that time the defendant made propositions to her, states acts of his not amounting to the offence charged, this does not prohibit him from proving by her the commission of the offence at a time other than that before referred to by the witness.

APPEAL from the County Court, Sonoma county.

When the thirteen grand jurors had been impanelled, there were seven others in attendance who had been summoned. The defendant was indicted for the crime of rape, and convicted and sentenced to confinement in the State Prison for the term of twenty years, and appealed.

The other facts are stated in the opinion of the Court.

Latimer & McCullough, for Appellant.

The Court should have called fifteen of the grand jurors, and not stopped at thirteen. (Act concerning Jurors, sec. 11.) After defendant's challenge, the Court should have filled the panel from the remaining seven in attendance. (Id., sec. 12.) The Court also erred in ordering the Sheriff to summon any special grand jurors, so long as any of those regularly drawn and in attendance remained. (Id.) The Court also erred in ordering a special grand jury. In no case can the Court form a new grand jury unless a challenge to the whole panel has been made and sustained. The admission of the testimony with respect to the several acts of the defendant was error. (Rosc. Crim. Ev. 80.) Evidence of a distinct offence cannot be admitted to prove another offence. *A fortiori*, evidence of an intention to commit another offence cannot be admitted. (Kinchelow *v.* The State, 5 Humph. 9.)

[1] Approved, People v. Southwell, 46 Cal. 153.

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Attorney-General, for the People.

Defendant was not entitled to have the first thirteen [70] grand *jurors called impanelled. (People *v.* Roberts, 6 Cal. 216; People *v.* Buster, 8 Id. 439; Stewart *v.* The State, 1 Ohio St. 68.) Such matters being in the discretion of the Court below, unless injury appears the Court will not intervene. (Com. *v.* Livermore, 4 Gray, 19; Montague *v.* Com. 10 Grat. 767.) If twelve competent grand jurors found the indictment, it is no injury to the defendant that some other twelve competent men did not find it. (U. S. *v.* Cornell, 2 Mason, 106.) The Court could not have done otherwise than it did do. If the Court had excused the jurors challenged, and filled out the panel with others summoned, the other defendants in custody might have excepted.

By the Court, SAWYER, J.:

The proper number of grand jurors having been regularly summoned for the October term of the County Court of Sonoma County, when the Court was about to impanel a grand jury, the first thirteen who answered to their names were called to the jury box, and, upon examination on the part of the defendant, three were ascertained to have formed and expressed opinions as to the defendant's guilt, and on that ground were challenged by him. There were two other parties in custody, also awaiting the action of the grand jury. These latter parties having no good objection to any of those called, the said first thirteen who answered were impanelled and sworn, as the regular grand jury for the October term, and were charged by the Court to investigate all matters proper for their consideration, except the case of the defendant, but not to consider his case. Upon the challenge by the defendant of the three grand jurors who had formed opinions as to his guilt, the Court, instead of rejecting them and filling up the panel out of the remaining jurors who had appeared, made an order for the summoning of a special grand jury for the examination of the defendant's case. To all of these proceedings the defendant excepted, and the action of the Court is assigned as error. It is claimed, on behalf of the defendant,

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*that he was entitled, as a matter of right, under the [71]
law, to the ten out of the thirteen found qualified, and to have the three who were disqualified set aside, and the panel completed out of those summoned, who had appeared. This cannot be so. The statute concerning grand and trial jurors is somewhat loosely drawn, but to give it such a construction would manifestly lead to absurd consequences. The rights of the defendant are no more sacred, and no more extensive, than the rights of the other two prisoners who were in actual custody at the time, or of twenty who might be in custody. If this claim of the defendant to have the first ten grand jurors who were qualified, and to have the panel filled up from the others summoned who were in attendance, must be allowed as a matter of right, then a claim on the part of the other two—or more, if there had been more prisoners—to the first thirteen who were qualified must also be allowed, and the other two prisoners were entitled to the very thirteen who were in fact impanelled, and who did constitute the regular grand jury for the term. In fact, upon the theory claimed, it might well be impossible to obtain a grand jury competent to act upon the case of more than one party in custody. The Court impanelled the first thirteen, so we cannot tell what the other two prisoners would have done had the three jurors been rejected; but if it was their right to except on that ground, and insist upon the invalidity of the indictment because of the rejection, it may safely and properly be assumed that the exception would have been taken. Thus, upon the theory maintained by the appellant, it was impossible for the Court to impanel a grand jury by which a valid indictment could have been found against all the defendants in custody at that term. Such a consequence would be absurd. But there is no necessity for such a construction. There was a lawful grand jury impanelled in the regular way for all the cases requiring examination at that term except the defendant's. His case was the exception, and therefore the special one, and the Court, in the exercise of its discretion under the circumstances, treated it as such, and ordered a special grand jury.

*But conceding the grand jury impanelled to be a [72]

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regular grand jury, perhaps it is intended to be claimed—although the point is not very distinctly made—that another grand jury should have been impanelled to consider the case of defendant by taking the first ten who were qualified, and filling up the panel out of the remaining jurors in attendance who had been summoned. Admitting such a mode of obtaining a grand jury for the case to be proper—and we see no reason why this course might not properly be pursued—this conclusion by no means necessarily follows. There is no provision expressly requiring a grand jury to be obtained in this way. The statute, in the ordinary course of proceedings, contemplates but one regular grand jury to be impanelled for each term. If more than one is called for, the second is a special grand jury. A grand jury made up in part of the members of a jury already impannelled, and in part of other jurors, would still be a different body, and might have a different foreman; and when so made up for an exceptional and special case, would as clearly be a special grand jury as though it were composed entirely of different members. In this case, there was a legal grand jury regularly impanelled for the term, competent to consider every case but the defendant's, but incompetent by reason of the disqualification of three of its members to consider his case. It was therefore proper to impanel a special grand jury to consider it. When such a necessity arises, the law authorizes such special grand jury to be summoned; and one was summoned in the mode prescribed, and the record discloses no objection to it, unless the questions already discussed constitute an objection. We think the indictment was found by a legal grand jury. The Court properly exercised the discretion conferred on it by the statute. (People *v.* Arceo, ante 40.)

The only other questions relate to the admissibility of the testimony of Susan Wiseman—a girl between eleven and twelve years of age—upon whom the offence was alleged to have been committed. The indictment alleged the offence to have been committed in January, 1865. After testifying that in January, 1865, she lived in the same house with de-
[73] fendant, *witness was asked if, at that time, or any previous time, defendant made any proposition to her,

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and having answered that he had, she was directed to state what he proposed to do. After stating some acts not amounting to the offence charged, witness was asked if defendant did anything else at any other time, and if so, what? Defendant's counsel objected, mainly on the ground that the prosecuting attorney had attempted to prove the offence at one particular time and failed, and that he was confined to that particular time, and could not inquire what occurred at any other time. The objection was overruled, and the witness having stated certain other acts not constituting the offence charged, there was a similar question, objection, and ruling, and the offence was finally proved. The case does not come within the rule, or the authorities cited. There was no election by the District Attorney, or attempt to prove the offence at any previous time or place. He was required, by the rules of evidence, to avoid leading his witness, and his question was accordingly general. He did not get the testimony sought by him, and it was necessary to pursue the inquiry further. When we consider the nature of the testimony sought, and the age and character of the witness, it is not surprising that she should have avoided the most disagreeable part of the testimony as long as possible. We see nothing indicating an attempt on the part of the prosecution to prove a different offence, within the meaning of the rule.

The judgment must be affirmed, and it is so ordered.

W. W. PENDEGAST *v.* R. F. KNOX AND JOSEPH OSBORN.

[1] APPEALABLE ORDER.—No appeal lies from an order refusing to amend an order allowing time to move for a new trial.

IDEM.—No appeal lies from an order striking out a statement prepared and filed on motion for a new trial.

*APPEAL from the District Court, Seventh Judicial [74] District, Lake county.

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[1] Cited, Quivey v. Gambert, 32 Cal. 305, 326; Mayne v. Jones, 34 Cal. 483. Overruled, Calderwood v. Peyser, 42 Cal. 112.

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Plaintiff recovered judgment in the Court below. Defendants applied for and obtained an order, which was entered as allowing them "twenty days' time in which to move for a new trial." They moved to have the order amended so as to read "twenty days' time to file statement on motion for a new trial herein," claiming that that was the order they applied for and which was granted, but that it was not entered right. The Court found there was a conflict of evidence as to whether the order was entered right, and denied the motion. The statement on motion for a new trial was stricken out, because not filed within the statutory time. Defendants had relied on the order as extending the time to file a statement, and did not file their statement within the statutory time. The Court for that reason, on plaintiff's motion, struck the statement from the files. Defendants appealed.

The other facts are stated in the opinion of the Court.

J. W. Dwinelle, for Appellants.

The order of Court is what the Court actually determined, and the record is not the order of the Court unless it is true. (Frink *v.* Frink, 43 N. H. 508; Bank of the U. S. *v.* Moss, 6 How. 38.)

P. W. S. Rayle, for Respondent.

The transcript discloses a conflict of testimony as to what the order of the Court below was. The order must therefore be affirmed. The orders are not appealable.

By the Court, RHODES, J.:

The defendants have appealed from the order refusing to amend an order previously made, allowing defendants "twenty days' time in which to move for a new trial," so as to
[75] read *"twenty days' time to file statement on motion for a new trial herein."

Also, from the order striking out a statement prepared and filed by defendants on motion for a new trial herein.

The question which first arises, and which, though not presented by the respondents, must of necessity be passed on

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before proceeding to investigate the other questions in the case, is whether the Court has jurisdiction of the appeal.

The solution of the question depends upon whether the orders can be regarded as special orders made after final judgment, within the meaning of sections three hundred and thirty-six and three hundred and forty-seven of the Practice Act. In Ketchum *v.* Crippen, 31 Cal. 365, it was held that the order refusing to strike out the statement, on motion for new trial, was not a "special order made after final judgment," within the meaning of those sections; that whether it did or did not follow the judgment in point of time, it did not follow it in logical sequence, or in any way depend upon it, and that, therefore, no appeal lay from the order. The orders in this case are of the same character as the one in that case, and that case is decisive of this. (See also Leffingwell *v.* Griffing, 29 Cal. 193; Peck *v.* Courtis, 31 Cal. 207.)

Appeal dismissed.

THOMAS CONGER *v.* THOMAS W. GILMER.

APPOINTMENT TO OFFICE.—The Boards of Supervisors, in filling vacancies in office, appoint to office; they do not elect.

APPOINTMENT BY BOARD OF SUPERVISORS.—The appointment to office by the Board of Supervisors is not complete until the person appointed has received a certificate of his election under the seal of the Board, signed by the proper officers of the Board. An appointment made by a majority of the Board may be revoked at any time before such certificate is issued, and another person may be appointed.

ELECTION TO OFFICE.—In the case of an election to office by the people, the rule is different, and the issuance of a commission is a mere ministerial act.

APPEAL from the District Court, Sixth Judicial District, Sacramento county.

*The facts are stated in the opinion of the Court. [76]

Robinson & Dunlap, for Appellant.

The appointment is complete when the commission issues. (People *v.* Whitman, 10 Cal. 44; Marbury *v.* Madison, 1 Cranch, 137.) We have been unable to find any authorities to the contrary. We have been referred to State *v.* Jeter,

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1 McCord, 233, and State *v.* Lysle, 1 Id. 238; but they are both cases of election, where the party had held for years, and do not apply in this case. A commission or certificate must issue to all appointed officers. (Hitt. Dig., Art. 4734.)

Attorney-General, for Respondent,

Argued that the act providing for the government of Sacramento county, approved April 25th, 1863, provided for filling vacancies in office by the Board of Supervisors, but made no provision for issuing certificates of appointment or election. He also cited People *v.* Scannell, 7 Cal. 432; Magee *v.* Board of Supervisors of Calaveras County, 10 Id. 376; and The People *v.* Maywarn, 5 Mich. 146.

By the Court, SANDERSON, J.:

This is an action brought by the Attorney-General, under the provisions of the fifth chapter of the Practice Act, to determine the right or title to the office of Justice of the Peace for the city of Sacramento, as between the relator, Thomas Conger, and the defendant, Thomas W. Gilmer. The relator and the defendant both claim title to the office under and by virtue of an appointment made by the Board of Supervisors of Sacramento county to fill a vacancy occasioned by the death of James Coggins, who had been elected to the office in question at the judicial election in 1865, and was holding it at the time of his death.

The case is as follows: The office having become vacant by the death of Coggins, the Board of Supervisors at a [77] regular *session, held at the Court House on the 4th of April, 1866, proceeded to fill the vacancy. Three persons were put in nomination, namely: Joseph Shaw, A. A. Wood, and the relator, Thomas Conger. On the eighth ballot Conger received a majority of all the votes cast, and was declared elected by the President of the Board. Thereafter, the amount of Conger's official bond was fixed at five thousand dollars. On the next day Conger presented his bond, and the same was referred to the Finance Committee. On the next day a resolution was offered by Supervisor Beckman to the effect that the appointment of the relator be recon-

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sidered and set aside, and that the Clerk of the Board be directed not to issue any certificate to Conger. This resolution was adopted. The Board then proceeded and filled the vacancy by the appointment of the defendant, who subsequently received a certificate of his appointment, qualified and entered into the possession of the office. Subsequently, the relator instituted proceedings in the District Court of the Sixth Judicial District by mandamus against the Board to obtain a certificate of his appointment, which resulted in his favor, and having qualified, he demanded the office from the defendant, who refused to surrender. Hence this action. The relator was successful in the Court below, and the defendant has brought the case here.

The only question involved in the case is whether the Board of Supervisors had the power which they exercised, or attempted to exercise, on the sixth of April, to reconsider and set aside their previous action in relation to the appointment of the relator, and direct their clerk not to issue his commission. If they had, their subsequent appointment of the defendant was valid, and he having duly qualified is now rightfully in possession of the office. Whether they had or not depends upon the nature of the power which is vested in them to fill vacancies—whether the power is that of "appointment" or "election," as contradistinguished from each other, and as to that question we think there is little room for controversy. The power to fill vacancies, whether vested in the Governor, Boards of Supervisors, or other public functionaries, *is of the same legal complexion, and in our statutes is [78] denominated the power of appointment, and is distinguished from that of election. The words "appointment" and "election" represent different tenures. The people elect, the Governor or other functionary appoints. Section one of the act concerning offices and officers provides that "there shall be elected or appointed, as hereinafter declared, the following officers," etc. Throughout the act the term "election" is applied to the action of the people in choosing officers, and the term "appointment" is applied to the action of whatever officer or Board is vested with the power to fill the given vacancy. Where the officer is chosen by the people, he takes

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by virtue of his election. Where the office has, from any cause, become vacant before the expiration of the term, and it is filled by the choice of the Governor or some other public functionary, the person chosen takes by virtue of his appointment.

The fact that Boards of Supervisors, when they exercise the appointing power, do so by first taking a vote, does not affect the character of the power, or render it at all different from what it is when exercised by the Governor. The Board acts by majorities, and in all cases the sense of the Board has therefore necessarily to be ascertained by taking a vote. The will of the Board can be ascertained in no other way, and the vote serves that purpose only, and does not convert the power exercised by them from that of "appointment" to that of "election."

The general law upon the subject of offices and officers (Stat. 1863, p. 388, sec. 16) provides that every officer elected or appointed to fill a vacancy shall be commissioned or receive a certificate of election or appointment. It is true that the act providing for the government of the county of Sacramento, and which, so far as it goes, controls the decision of this case, has no such provision, and that all acts and parts of acts inconsistent therewith are so far repealed, but it does not therefore follow that no commission or certificate is to be issued to officers in Sacramento county. On the con-
[79] trary, *the latter act being silent on that subject, the general law supplies the rule—for there can be no conflict between them where one is silent. It follows, then, that the Board of Supervisors, when an appointment is made by them, must issue to the appointee a commission or certificate of appointment, under the seal of the Board and signed by the proper officers of the Board.

The power then being that of "appointment," the next question is, when is the appointment complete—when can it be said that the appointment has been made? Has it been made when the President of the Board has announced the result of the ballot, or when the commission or certificate of his appointment has been made out?

In Marbury v. Madison, 1 Cranch, 54, it was held by Mr.

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Chief Justice Marshall that the appointment has been made when the last act required of the person vested with the power has been performed. In that case the appointment was made by the President of the United States, and it was held that the appointment was complete when the President had signed the commission. This must be so for obvious reasons. Until the last act has been performed the whole matter is *in fieri*, and within the control of the person or persons by whom the appointment is to be made, and there is nothing to prevent them from changing their minds and appointing some other person than the one first selected. Suppose the Governor should be called upon to fill a vacancy, and should determine in his own mind to appoint a particular individual: undoubtedly he may change his mind as often as he may please until he has finally signed a commission to some particular individual. Until then he has not acted. Until then the whole matter is *in fieri*. Where the appointment comes from the Board of Supervisors the rule is the same. Until they have finally acted—that is to say, until the commission or certificate of appointment has been made out in due form under the seal of the Board, and signed by the officers of the Board, the whole matter is still within their control, and they *are as much at liberty to change their minds [80] as the Governor. No distinction can be made between the two cases.

It results that the Board had power to rescind their first action at the time they did so, and further, that the subsequent appointment of the defendant was valid.

Where a person is elected to an office his right is established by the result of the election, and does not depend upon his getting a commission, for in such a case the choice comes from the people, and when they have voted, the last act required of them has been performed. In such a case the issuing of the commission is merely a ministerial act, to be performed by the proper officers, and not, as in the case of a taking by appointment, a part of the act to be done. Hence the authorities cited by the Attorney-General have no application.

Judgment reversed, and Court below directed to enter judgment in conformity with the views expressed in this opinion.

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THE PEOPLE v. JAMES JONES.

EVIDENCE ON TRIAL FOR ROBBERY.—On the trial for an assault with intent to rob, evidence on behalf of the prosecution is not admissible for the purpose of showing that the defendant entered into an agreement to commit another robbery on a different occasion.

CONFESSIONS OF DEFENDANT.—If the prosecution prove the defendant's confessions of the crime with which he stands charged, circumstances may be shown corroborative of those confessions.

EVIDENCE IN CRIMINAL CASE.—On the trial of a defendant charged with one crime, testimony is not admissible to show that he had been engaged in plans for the commission of other crimes.

APPEAL from the County Court, Placer county.

The defendant was convicted, and sentenced to the State Prison, and appealed.

The other facts are stated in the opinion of the Court.

Jo. Hamilton, for Appellant.

Attorney-General, for the People.

[81] *By the Court, SAWYER, J.:

This is an indictment for an assault with intent to rob a Chinaman named Hong Koy, on the 26th of March, 1866, against the same party convicted of robbery in the case of People *v.* Jones, 31 Cal. 565.

In this case, we think the law necessary to the information of the jury fairly stated to them by the Court in its general charge, and in the instructions given at the request of defendant's counsel.

The witnesses were generally the same as those examined in the other case, and much of the testimony was of a similar character. In this case, the confessions of the prisoner were very particular. He stated that Hong Koy was in the habit, on Monday morning, of going down a certain road on his way to Sacramento to sell his gold dust; that he and one McCrea, indicted with him, knowing Hong Koy's habit, lay in wait for, and assaulted him for the purpose of robbing him of his gold dust, but that owing to the blunder of McCrea in seizing hold of the Chinaman instead of the horse,

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they failed in the attempt; that Hong Koy rode a gray horse; that his gold dust was in a bag fastened to the saddle; that McCrea, instead of seizing the horse, as he should have done, seized the Chinaman on the side opposite the one where the gold was, and pulled him off, and the horse ran away with the gold—about one thousand one hundred dollars—and they only got what little change he had on his person, and that the Chinaman afterwards ran after the horse. McCrea denied his blunder, and said that he seized both the horse and Chinaman, but could not hold both, and the horse jerked away; that he fired his pistol at the horse, but did not stop him. It was proved by other witnesses that there was such a man as Hong Koy residing at Stewart's Flat; that he was in the habit of going to Sacramento on Mondays to sell his dust; that he owned a gray horse, and was in the habit of going down the said road riding his horse, to take the cars at Pino; that about the date *of the alleged [82] assault, in the morning—the time when he usually went down—a gentleman heard the report of firearms, and soon after saw Hong Koy's horse going down the road alone, coming from the direction where the report of the gun was heard, and soon after saw Hong Koy running after him; that on Monday morning Hong Koy came to the house of one Buzzell, by whom he was well known, on the said road to Pino, in a state of great excitement, having with him his horse, and some five to seven pounds of gold in a leather bag, and wanted him, Buzzell, to go to Pino with him, where he was going to take the cars for Sacramento; that Buzzell went with Hong Koy to Pino, and carried the gold for him, and at his request went down again to meet him on his return next day, and accompanied him home. On his return, the Chinaman showed an assay certificate for gold of the value of one thousand sixty-six dollars. We think these facts strongly corroborative of the confessions of the prisoners, tending to show that the offence had been committed; and that the evidence was properly submitted to the consideration of the jury. But there was much irrelevant testimony admitted, tending to show that the prisoners were engaged in plans for the commission of other crimes, similar to the evidence dis-

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cussed in the other case. This kind of evidence is sufficiently indicated in our opinion in that case. The evidence in relation to an agreement to rob the Paymaster on the Pacific Railroad was also introduced in this case, in the same manner and under the same circumstances as in the other case. Such testimony could not fail to be very prejudicial to the defendant; and for these reasons, the judgment must be reversed and a new trial had, and it is so ordered.

F. E. CORCORAN AND ELIZABETH CORCORAN, HIS WIFE v. J. G. DOLL AND J. L. SIMPSON.

[1] INTEREST ON JUDGMENT.—When the judgment is not rendered by default, but upon answer and after trial, the interest may be added to the principal, and the [88] *judgment may direct the whole sum to draw the same rate of interest which the principal drew by the contract, although the complaint does not pray that the judgment draw interest.

PROOF OF SIGNATURE TO NOTE.—If the complaint contains a copy of the note sued on and is not verified, and the answer denies its execution, but is not sworn to, the note is admissible in evidence without proof of the genuineness of the signature.

ERASURES ON NOTE.—A party offering a promissory note in evidence is not obliged before the same is admitted to account for an erasure appearing upon the face of it, unless the erasure has been made or appears to have been made after the execution of the instrument, and is on a part of the note which is material to the point in dispute.

ERASURES ON PRINTED NOTE.—When a printed form of a promissory note is used and an erasure is made only as to the printed matter, the presumption is that it was made prior to the execution of the note and to suit the terms agreed on by the parties.

VARIANCE BETWEEN NOTE AND COPY IN COMPLAINT.—If the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full and states the rate of interest in words as well as figures, the variance is immaterial.

PLAINTIFFS IN SUIT ON NOTE.—If the promissory note is the separate property of the wife, suit may be brought on it in her name alone, or the husband and wife may sue jointly.

[2] DEFENCE TO NOTE PAYABLE TO ADMINISTRATOR.—If a party brings suit on a note made payable to him as administrator, and is at the time in possession of the same,

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[1] Relief may be granted on facts of the case, cited, N. C. & S. C. Co. v. Kidd, 37 Cal. 324.

[2] Cited, Wedderspoon v. Rogers, post 574.

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evidence is not admissible on behalf of the defendant to prove that the plaintiff is not the real party in interest, even if the money loaned for which the note was given belonged to the estate of the deceased.

LORD.—Perhaps, in such case, if the defendant has a counter claim against the estate of the deceased, and the money due on the note would be assets in the hands of the plaintiff, he could set it up in defence *pro tanto*.

APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

The plaintiffs alleged in the complaint that the plaintiff, Elizabeth Corcoran, on the 17th day of July, 1861, and thence until the 23d day of October, 1862, was the widow of Preston H. Lee, and that on the day last named she intermarried with the plaintiff, F. E. Corcoran, and that the defendants, on the 17th day of July, 1862, in consideration of twenty thousand dollars by said Elizabeth, then loaned them at their request, gave her their promissory note in writing. The following is a copy of the note as set forth in the complaint:

*"$20,000. [84]

"RED BLUFF, July 17th, 1862.

"Twelve months after date, without grace, we promise to pay to the order of Mrs. Elizabeth Lee, administratrix, twenty thousand dollars, for value received, with interest at the rate of one and a half (1½) per cent. per month from this date until paid, payable quarterly.

"DOLL & SIMPSON.

"No. ———."

The suit was commenced November 14th, 1864, and the complaint admitted that the interest had been paid up to the 17th day of January, 1864, and prayed for judgment for the principal, and interest from the 17th day of January, 1864, until paid. The pleadings were not verified. The answer denied each and every allegation in the complaint, and also denied that the plaintiffs were the holders or owners of the note. For a further defence, the answer set up that the note was given by the defendants in consideration of an assignment of a certain debt which the plaintiff, Elizabeth, then held as the administratrix of the estate of Preston H. Lee,

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deceased, against the firm of Booth & Co. of Sacramento, which debt existed before the death of said Lee, and that said Elizabeth received the note in her representative capacity as administratrix of the estate of said Lee, and that on the 23d of April, 1863, she ceased to be such administratrix, and one P. F. Doling became the administrator, and that said Elizabeth then delivered the note to said Doling, who was still the owner and holder of the same. On the trial, the plaintiffs' attorney offered in evidence the original note, of which the following is a copy:

"$20,000.

"RED BLUFF, Cal., Jan. 17, 1862.

"Twelve months after date, without grace, we promise to pay to the order of Mrs. Elizabeth Lee, Adm'x, at the Banking House of Doll & Simpson, in Red Bluff, Twenty Thousand Dollars, for value received, with Interest at the rate of
[85] 1½ per *cent. per month from this date until paid, payable monthly quarterly.

"DOLL & SIMPSON.

"No. ———."

The words "at the" were contained in said note in printed script letter; the words "Banking House of Doll & Simpson, in Red Bluff," were contained in said note in printed capital letters; and the word "monthly" in printed script letters, and the erasures were made in red ink lines. The erasures were made by drawing a red line with a pen across the words "at the Banking House of Doll & Simpson, in Red Bluff," and the word "monthly." The defendants objected to its admission, on the grounds—1st, that it appeared upon the face of the note that portions of it had been altered or erased, and that such alterations or erasures had not been accounted for by the plaintiffs; 2d, that the note set out in the complaint is not the same as the note now offered in evidence, and that its execution has not been proven. The Court overruled the objections, severally, and admitted the note in evidence, and counsel for defendants excepted. The plaintiffs here rested their case.

The counsel for the defendants then moved for a nonsuit,

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because the note was alleged to be the joint property of the plaintiffs, and was proved to be the separate property of Mrs. Corcoran. The Court denied the motion. The defendants then offered to prove the defence set up in their answer. The plaintiffs objected, on the ground of irrelevancy, and the Court sustained the objection. The plaintiffs recovered judgment, and the defendants appealed.

The other facts are stated in the opinion of the Court.

Edward Tompkins, for Appellants.

The note was not proven so as to entitle it to be received in evidence. The Practice Act, making the genuineness and due execution of a written instrument copied into the complaint admitted, unless the answer is verified, does not apply *to this case. This action is brought upon the [86] loan of money, and the note is only evidence of the loan. The complaint does not allege a general liability by reason of the note, but a particular liability out of which the note arose. The rule requiring an answer denying the execution of a note copied into the complaint to be verified, is not one requiring a substantial compliance, but a literal one. In this case, the original note is not correctly copied into the complaint. Plaintiffs are not therefore entitled to the benefit of the rule. Defendants are not required to answer under oath whether they executed a note resembling the one set out in the complaint, but whether they executed a note, of which the one set out is a literal copy. The plaintiffs should have accounted for the erasures. They were material. If the words "at the Banking House of Doll & Simpson, at Red Bluff," remain, then there is no averment in the complaint, and no evidence that the note is due, for it does not appear that payment has been demanded there.

The wife should have sued alone. The history of the transaction contained in the complaint shows that the note is her separate property, and at the same time it is averred that plaintiffs are the owners and holders. By this last averment the note is made community property, and it amounts in legal effect to an averment that the note had been transferred from the wife to the plaintiffs. This was not proved.

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The Court also erred in excluding evidence that the plaintiffs were not the real parties in interest. Defendants were entitled to show that they did not owe plaintiffs the money, but owed it to some one else. If Doling should bring suit on the note, it would be no answer for these defendants to say they had paid plaintiffs. (2 Greenl. Ev., sec. 163; Conroy *v.* Warren, 3 John. Cas. 263; Gunn *v.* Castine, 10 John. 387; Waggoner *v.* Colvin, 20 John. 367; Seeley *v.* Engel, 17 Barb. 530; Cummings *v.* Morris, 25 N. Y. 627; and James *v.* Chalmers, 6 N. Y. 215.)

Winans, Belknap, Hoge & Long, for Respondents.

[87] *Where there is an answer and a trial it is unnecessary for the complaint to ask that the judgment bear interest. The note is the sole cause of action, and judgment is asked only for the amount due on it. The non-verification was therefore an admission of its genuineness. The variance between the original note and the copy contained in the complaint was not material, and cannot affect respondents' rights. (Pr. Act, secs. 71 and 579; Dresser *v.* Smith, 1 How. Pr. 172; and Chapman *v.* Carolin, 3 Bos. 456.) The insertion of the words "one and a half" did not alter the sense of the note. The words "monthly" and "at the Banking House of Doll & Simpson, in Red Bluff," were erased before the note was executed, and were not a part of it, and not required to be placed in the copy. Even if the note had contained the words making it payable at the Banking House of Doll & Simpson, it would not have been necessary to present it there for payment. (Wallace *v.* McConnel, 13 Pet. 136; 1 Pars. on Notes and Bills, 309.) As to the materiality of the erasure, see Zeigler *v.* Wells, 28 Cal. 265. "When a married woman is a party, her husband shall be joined with her." (Pr. Act, sec. 7.) The complaint clearly shows that the note is the separate property of the wife. (Van Maren *v.* Johnson, 15 Cal. 310.)

Appellants claim that the Court erred in excluding evidence that the plaintiffs were not the real parties in interest. The Court below did not refuse to permit appellants to prove that respondents were not the real parties in interest. It merely held that what appellants offered to prove would not show

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that respondents were not the real parties in interest. What appellants offered to prove would have been a contradiction by parol evidence of the written obligation contained in the note. The note was payable to Mrs. Elizabeth Lee personally. The abbreviation "Adm'x" did not alter her personal or present her in a representative capacity. (Aud *v.* Magruder, 10 Cal. 289; Conner *v.* Clark, 12 Id. 168; Stackpole *v.* Arnold, 11 Mass. 27; Shankland *v.* Corporation of Washington, 5 Pet. 394.) But if the note was given to Mrs. Lee *as administratrix, and for a debt due the estate, [88] she could still sue in her own right by virtue of title in herself. (1 Pars. on Bills and Notes, 155.)

By the Court, SANDERSON, J.:

I. The objection to the judgment on the ground that it includes the interest and directs that the judgment shall draw interest at the rate of one and a half per cent. is not tenable. It has been repeatedly held that it is not error to include principal and interest in the judgment, and direct that thereafter the whole sum shall draw the same rate of interest which the principal drew by the terms of the contract. (Guy *v.* Franklin, 5 Cal. 416; Emeric *v.* Tams, 6 Id. 155; McCann *v.* Lewis, 9 Id. 247; Mount *v.* Chapman, 9 Id. 297.) The judgment not being by default, but upon answer and after trial, the fact that the complaint does not ask for interest upon the judgment is of no consequence. Where the judgment is upon a trial, the Court may grant any relief which is within the issue, notwithstanding it may not be included in the prayer of the complaint. (Lane *v.* Gluckauf, 28 Cal. 294.)

II. The objection that the note was improperly admitted without evidence of the genuineness of the signature is also without substantial foundation. The action is upon the note, and the complaint contains a copy, and the answer is not verified. Where such are the conditions, the due execution of the note is admitted. (Pr. Act, sec. 53.)

III. The point that the note ought not to have been admitted in evidence until after the plaintiff had accounted for the erasures appearing upon the face of it is also untenable. The four hundred and forty-eighth section of the Practice Act applies to

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a case where the alteration has been made, or appears to have been made, after the execution of the instrument, and where the alteration is as to a part of the instrument which is material to the question in dispute. The note does not match the first of these conditions. It does not appear to have been altered after its execution. The note is not in writing, but in [89] print. As *printed, it is payable "at the banking house of Doll & Simpson, in Red Bluff," and the interest "payable monthly quarterly." The place of payment and the word "monthly" are erased by a line in red ink drawn through them. The use of both the words "monthly quarterly" in the printed form is manifestly either a misprint, or they were both inserted with the intent that one or the other should be erased when the form should be put in use, for it would be absurd to provide that the interest should be payable both monthly and quarterly, and it certainly would be difficult of performance without paying interest twice at the agreed rate. Had the note been in writing and not in print there might be some ground for saying that the words "at the banking house of Doll & Simpson, in Red Bluff," were erased after the execution of the note, or so appeared. But in view of the fact that a printed form was used, which could not have been printed especially for the use to which it was put, and must have been printed prior to the time the contract in suit was made; and in view of the fact that the erasure of the word "monthly," which was incontestibly made prior to the execution, is in the same kind of ink, leaves no plausible reason for saying that the note was altered, or that it has the appearance of having been altered after it was executed. Where printed forms are used, they frequently have to be altered to suit the terms of the contract, and where an alteration is made only as to the printed matter, the presumption is that it was made prior to the execution of the contract, and made to suit it to the terms agreed upon between the parties.

What we have here said is also an answer to the point that there is a variance between the copy of the note given in the complaint and the original which was offered in evidence. Read the latter without the erasures, and the former is a copy,

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except that it gives the word "administratrix" in full, instead, as abbreviated in the original, and states the rate of interest in words as well as figures, which the original does not; which discrepancies are wholly immaterial. Doubtless it would *have been better to have given a *fac simile.* [90] Had that been done, accompanied with the averment that the erasures were made before the execution of the note, and the complaint verified, the whole question would have been satisfactorily settled, doubtless by the pleadings alone.

IV. Nor is there any merit in the point that, conceding the note to be the separate property of the wife, the action was improperly brought in the names of both husband and wife, although in such a case the wife may sue alone if so disposed. She may also, if so disposed, join her husband. (Van Maren *v.* Johnson, 15 Cal. 308, and Calderwood *v.* Pyser, 31 Id. 333.)

V. Nor did the Court err in excluding the evidence offered by the defendants to prove that the plaintiff, Elizabeth Corcoran, was not the real party in interest. The note on its face is made payable to her and was at the time in her possession, and conceding that the money which she loaned and for which the note was given, belonged to the estate of her deceased husband, and that she was at the time acting as administratrix of his estate, the note itself was nevertheless her property and she is therefore the real party in interest within the meaning of the fourth section of the Practice Act. Parsons states the rule thus: "Only the executors and administrators, and not the heirs or next of kin of persons deceased, can claim possession of his notes and bills, or demand payment, or put them in suit. * * * It is otherwise if they receive a note payable to themselves, though for a debt due to the estate, and though payable to them as executors. For in such a case their representative character constitutes no part of their title. The note never belonged to their testator, but vested in them originally. And if a bill or note, belonging to the testator at the time of his decease, is payable to bearer, they need not in suing upon it make title through him: they may sue as bearers simply. The same distinction is applicable to guardians, receivers, assignees in bankruptcy, and trustees of any description." (1 Pars. on Bills and Notes, 154.)

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Perhaps, in such a case, if the defendant has a
[91] counter *claim against the estate of the deceased, and the money due on the note would be when paid assets in the hands of the plaintiff, he could set it up in defence *pro tanto;* but there is no such question in this case.

Judgment affirmed.

THE PEOPLE *v.* SILAS MARTIN.

[1] TRANSCRIPT ON APPEAL IN CRIMINAL CASE.—The Supreme Court will not review the action of the Court below in a criminal case unless the record contains a bill of exceptions, or a correct statement of the facts which transpired at the trial, signed and settled by the Judge.

IDEM.—A bill of exceptions signed and settled by the Judge, and filed with the Clerk below, is the correct mode of making up a record in a criminal case on appeal.

[2] INDICTMENT.—An indictment which charges but one offence, and that in the language of the statute, is sufficient.

APPEAL from the County Court, Monterey county.

The defendant was charged with and convicted of the crime of incest, and appealed.

The other facts are stated in the opinion of the Court.

Samuel F. Geil, for Appellant.

Attorney-General, for the People.

By the Court, SAWYER, J.:

There is in the record no bill of exceptions settled or signed, or in any way authenticated by the Judge, or otherwise. There are a number of loose papers, not appearing to form parts of any one document, commencing with what purports to be a copy of the indictment, certified up by the Clerk. It is neither headed nor indorsed, or in any way designated

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[1] Cited, People v. Tetherow, 40 Cal. 287; People v. Padillia, 42 Cal 538.

[2] Cited, People v. Burke, 34 Cal. 663.

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as a bill of exceptions. The last paper in the series purports to state what took place on the trial, and terminates with a *motion for a new trial. It is signed by the [92] defendant's attorney alone. This document is indorsed:

"MONTEREY, (Cal.,) December 26th, A. D. 1866.
"Filed December 14th, 1866. Which said motion was denied by the Court, and the defendant excepted.
"S. F. GEIL, Attorney for Defendant.
"W. H. RAMSEY, County Judge."

There is nothing here to show that any bill of exceptions was ever settled or signed by the Judge. If the signature of the Judge can be said to attest anything, it is the statement that the motion of defendant was denied, and the defendant excepted. It may have been denied on the ground that there was no settled bill of exceptions, or correct statement of the facts which transpired at the trial. There is, at all events, nothing to show that the preceding documents contain a correct history of the proceedings at the trial. We cannot review the action of the Court without having some authentic record showing what its action was, and upon what it was based. A bill of exceptions, settled and signed by the Judge and filed by the Clerk is the mode prescribed for making such a record. (Cr. Pr. Act, sec. 435; People v. Thompson, 28 Cal. 218; People v. Honshell, 10 Id. 86; People v. Stonecifer, 6 Id. 411.) There is no such bill of exceptions in this record, and this disposes of most of the questions raised.

The indictment charges but one offence known to our law, and charges that offence in the language of the statute. (Act concerning Crimes and Punishments, sec. 123; and Act regulating Marriages, sec. 21.)

The other questions raised by the appellant are not presented by this record.

Judgment affirmed.

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[93] *J. H. BLUMENBERG v. JOHN MYRES.

TENANT WHO SUB-LEASES. — If the lessee sub-lets the leased premises for the entire term of his lease from the lessor, no right of entry remains in him upon the expiration of the term. The right of entry is in him who holds the reversion.

[1] CREATION OF A NEW TENANCY.—If a tenant for one year or more, before the expiration of his term procures the landlord's receipt for one month's rent, commencing at the expiration of the term, a new tenancy of one year is not thereby created. The new tenancy is only for one month.

TAKING A NEW LEASE.—If the tenant takes a receipt from his landlord, specifying the amount of rent paid and the length of the term, to commence on the expiration of the lease, the new term will be for the time specified in the receipt. No new tenancy by implication arises in such case.

CREATION OF A NEW TERM.—When the lessee holds over, and the landlord receives rent after the expiration of the term, a new tenancy arises by implication, subject to the covenants and conditions of the original lease, but the new term is not necessarily for one year.

APPEAL from the County Court, city and county of San Francisco.

The plaintiff paid Booth for the premises one hundred and fifty dollars per month. The plaintiff appealed.

The other facts are stated in the opinion of the Court.

C. H. Parker, for Appellant.

The plaintiff could rest his right to recover of defendant on his lease to Myres, the prolongation and notice to quit, and the proofs offered in connection therewith. The only excuse stated in the answer for holding the premises against Blumenberg is that the defendant had taken a lease from Booth, dated May 31st, 1865, to take effect July 1st, 1865. This defence is based upon the assertion that Booth had the right to lease the premises on and after July 1st. That could only be on the ground that the relation of landlord and tenant between Blumberg and Booth had been terminated on July 1st, 1865. If Blumenberg's relation of tenant to Booth has been terminated, how was it accomplished? by what means, and by whom? Blumenberg has not terminated it; Booth has not done so; Blumenberg has not been requested

[1] Approved, Skaggs v. Elkus, 45 Cal. 159.

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to surrender—no notice has ever been served upon him. Blumenberg, by paying one month's rent, to commence after the expiration of his term, *bound himself to pay [94] the same rent every month for one year. (Tay. Land. and Ten., sec. 22.) If Booth could have compelled Blumenberg to hold the premises for one year, Blumenberg acquired the right to retain possession for one year by paying the rent. (Tay. Land. and Ten., sec. 476.) A new term of one month had been created, which is admitted on all sides. But the plaintiff contends that *a new term of one year* had been created by the holding over of one month after the expiration of the yearly lease. I cite as authorities on this point, Tay. Land. and Ten., secs. 22, 54, 55, 467, 476; Adams' Eject., p. 142, 145, 182, note 2; 17 Cal. 85; 25 Id. 25; 28 Id. 157; 9 Johns. 267; 1 Saund. 275 *a*.

J. J. Papy, for Respondent.

If after the expiration of a tenancy, determined by lapse of time, or the happening of a particular event, the reversioner or remainderman receives rent, *as such*, from the person in possession, or in any other way acknowledges him as tenant, a tenancy will thereby be created, subject to the conditions of the original lease. (Tay. L. and T., sec. 22, p. 5 of ed. 1844; Conway *v.* Starkweather, 1 Denio, 113; Bradley *v.* Covill, 4 Cow. 350; Abell *v.* Radcliff, 15 J. R. 505; Jordan *v.* Ward, 1 H. Black. 97.) In this case, there was no payment of rent to Booth by plaintiff after the termination of the lease, or any act which can be tortured into a continuance of the tenancy under the terms of the original lease, or under any other terms. When a lessor conveys his full term, he ceases to be a lessor and becomes an assignor, thereby destroying the relation of landlord and tenant previously existing. (Smiley *v.* Van Winkle, 6 Cal. 605; Palmer *v.* Edwards, 1 Doug. 185; 5 Bac. Ab. p. 558, Leases 3.) And the production of the receipt is of no avail because defendant never held under it. (Reay *v.* Cotter, 29 Cal. 170.) A lessee, during his occupation, holds both by privity of estate and of contract. His *privity of estate* is dependent upon, and co-existent with, the continuance of his term. By an assignment he

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[95] *divests himself of his privity, and transfers it to his assignee; it remains annexed to the estate, into whose possession soever the land may pass, and the assignee always holds in privity of estate of the original landlord. (Tay. L. and T., Assignments, sec. 11; Walton v. Cronly, 14 Wend. 64; Auriol v. Mills, 4 T. R. 94; Pot v. Jackson, 17 J. R. 237.)

By the Court, RHODES, J.:

The plaintiff, who was the lessee of Booth for the term of five years, commencing June 1, 1860, sub-let the premises to the defendant, for the term of three years from February 15, 1862, and on the 15th of April, 1864, he and the defendant executed an instrument by which it was agreed that "said lease be prolonged up to June the first, 1865, being the full term of the lease said lessor holds from Junius Brutus Booth, for five years ending June the first, 1865." On the 23d of March, 1864, which was prior to the execution of the last mentioned instrument and before the expiration of the plaintiff's term, he procured from Booth a receipt for the sum of four hundred dollars, for one month's rent for the premises, from June 1st to July 1st, 1865. On the 31st of May, 1865, Booth leased the premises to the defendant for one year from July 1, 1865. This action was commenced under the Forcible Entry and Detainer Act, July 31, 1865. The defendant had judgment on the findings.

The instrument executed April 5, 1864, was an assignment to the defendant of the lease of Booth to the plaintiff. It purported to pass all of the term then remaining, and it in fact left no reversionary interest in the plaintiff. (Tay. Land. and Ten., secs. 16, 109, 426; 1 Wash. on Real Prop., 833.) No right of entry therefore remained in or accrued to the plaintiff by reason of the expiration of the term. That right attended the reversion, and both were in the hands of Booth, except in so far as they may have been affected by the transaction evidenced by the receipt of Booth.

[96] Accepting the receipt as constituting a lease to the plaintiff, *the question is, what term was thereby created? The plaintiff holds that the receipt is evidence of a lease for a year; that the holding over for one

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month by the defendant, and the payment by the plaintiff to Booth of one month's rent, created, by implication of law, a new term of one year between Booth and the plaintiff, commencing at the expiration of the term of five years. The doctrine which the plaintiff invokes, that where the lessee holds over and the lessor receives rent accruing after the expiration of the term, a new tenancy arises for a further term, subject to the covenants and conditions of the original lease, is true as a general rule, and the reason is, that the receipt of the rent is considered as an acknowledgment of a subsisting tenancy. But it does not follow that the new term must necessarily be a year. Where the former lease was for a period less than a year, as a quarter or a month, or where the term though extending to a year or more, was composed of such periods, there is no ground for holding that the new term, presumed from the holding over of the tenant, and the receipt of rent by the landlord, extends beyond one of the periods of the tenancy. The tenant who enters under a lease for a month, and holds over, and during the second month pays rent, is not entitled to claim a new term of one year, but he becomes a tenant from month to month. When the tenancy is found from the fact of the holding over of the tenant and the acknowledgment of the landlord, it is presumed to be of the same character—as annual, quarterly, monthly, etc.—and upon the same covenants and conditions as the previous tenancy. It rests upon implication alone. But when the parties have made an express agreement relating in any respect to the new tenancy, then in that respect there is no room for implication. If the parties specify the rent, the time of payment, the term, or any of the usual covenants or conditions of a lease, whether they agree or disagree with the terms of the former lease, they enter into the new lease and determine the rights of the parties while the tenant is holding over. The receipt produced by the plaintiff showed the payment by him of four hundred dollars for one month's rent, *thus establishing both the rent and the term. [97] He has no better right to recur to the former lease, in disregard of the time, than of the rent specified in the receipt. The utmost the plaintiff was entitled to, as growing

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out of the receipt, was the possession of the premises from the first of June to the first of July, and at the last date his new term ended. After that time, he was not entitled to the possession as against his landlord, Booth, nor was he in a better position to recover the possession from the defendant, for although he was authorized to treat the defendant as his tenant during the lease for one month, his interest in the premises expired at the end of that month, and at the same point of time the defendant's right to the possession under his lease from Booth commenced. We therefore agree with the learned Judge of the County Court in the opinion that the receipt was evidence of a lease for one month only, and that after the expiration of that time it was too late for the plaintiff to commence an action for the recovery of the possession.

The plaintiff's construction of the holding over, and the receipt of accruing rent by the landlord, if it could be maintained, would be fatal to his recovery in this action—the action being brought, not on the ground of forfeiture, but of the expiration of the defendant's term. The defendant having held over after the expiration of his term, the plaintiff then holding the lease for one month could at his election treat him as a trespasser or a tenant. The plaintiff, on the 3d day of June, demanded of the defendant, who was then holding over, one thousand dollars for the rent of the current month. He thereby acknowledged the defendant as his tenant. Giving the defendant the same benefit of the implication as to the term of the new tenancy that the plaintiff claims as between him and Booth, his term also would continue for one year from the first of June, and he would not be liable to this action until the expiration of the year.

Judgment affirmed.

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*THE PEOPLE v. JOHN McCREA. [98]

EVIDENCE OF CIRCUMSTANCES TO FIX TIME.—If a defendant, on trial on a charge of robbery, claims to have been at another place when the robbery was committed, and there is testimony tending to show that he was at such other place about that time, any circumstances which will tend to fix the time he was at such other place are admissible in evidence.

[1] HEARSAY TESTIMONY.—Statements of a person who has been robbed, made to a third party, as to the description of the person who robbed him, are hearsay, and not admissible in evidence on the part of defendant to show that he is not the person thus described.

ACQUIESCENCE IN STATEMENTS OF OTHERS.—Admissions and confessions of guilt may be implied from the acquiescence of the party to whom they are made in the statements of others made in his presence. It makes no difference that the statements which call for a reply are made by a party who is incompetent to testify.

IDEM.—Such statements are admitted in evidence, not as themselves evidence of the truth of the facts stated, but to show the conduct of the defendant under the circumstances.

APPEAL from the County Court, Placer county.

The assault with intent to rob was alleged to have been committed at Stewart's Flat, on the 26th day of March, 1866. One Baird owned a mining claim some distance from the place of the alleged assault. He was called as a witness on behalf of defendant, and testified that the defendant and Jones were at his claim on the morning of the 26th of March, and left there about ten o'clock A. M., and went towards their place of residence; that he went to Stewart's Flat on the afternoon of the same day, to consult with Mr. Kincaid, an attorney at law. The defendant's attorney then offered to prove by the witness that when the witness saw Kincaid that afternoon at Stewart's Flat, Kincaid told the witness that he had heard of the alleged assault to rob committed on Hong Koy, and had heard that it was committed in the forenoon of that day, within half a mile of Stewart's Flat. The District Attorney objected to the admission of the testimony, and the Court sustained the objection. The defendant then called J. T. Kincaid as a witness, and offered to prove by him the same conversation with Baird, and also offered to prove by him that Hong Koy came to him on the day of the alleged robbery and described the persons

[1] Approved, People v. McLaughlin, 44 Cal. 439.

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who attempted to rob him, and that the descriptions
[99] thus *given did not correspond with defendant and Jones. The District Attorney objected to the evidence, and the Court sustained the objection. The jury found the defendant guilty, and he was sentenced to confinement in the State Prison, and appealed.

The other facts are stated in the opinion of the Court.

Jo. Hamilton, for Appellant.

Chinamen are not permitted to testify by the laws of this State in cases where a white man is a party. The testimony of Pool should not therefore have been received as to the statements of Hong Koy. Hong Koy, not being a witness, his statements should not have been received. The statements of the Chinaman to Kincaid as to who robbed him should have been received.

Attorney-General, for the People.

By the Court, SAWYER, J.:

McCrea was jointly indicted with Jones, in the case of People *v.* Jones, 31 Cal. 565, for an assault with intent to rob Hong Koy, but separately tried. The evidence is very much like the evidence in the case of Jones. Some of the same errors were committed in admitting testimony that we have pointed out in that case, and it is unnecessary to consider them further.

We also think there was error in refusing to admit the testimony of Baird, Kincaid, and some others, as to circumstances tending to identify the day on which defendant was at Baird's claim. We think the evidence excluded was admissible for that purpose. It was claimed by defendant that he was at Baird's claim on the morning of the 26th, at the very time when the robbery was claimed to have been committed, and therefore that it could not have been committed by him. There was testimony tending to show that he was at Baird's claim on some occasion about that time, and
[100] it was important *to identify the precise time, and any

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circumstances which would tend to fix the time were admissible for that purpose.

The testimony offered as to the description given by the Chinaman to Kincaid of the parties who made the assault was properly excluded. It was mere hearsay testimony.

Sheriff Poole, under objection and exception on the part of the defendant, testified in regard to conversations which took place on a day subsequent to the alleged robbery in the presence of the prisoner. He stated: "I asked the Chinaman (Hong Koy) if he knew this man (pointing to defendant, McCrea.) The Chinaman said, yes. He, the Chinaman, then took hold of my arm and showed me how defendant had tried to rob him. The Chinaman said: You are the man who tried to rob me. He then told me how it was done. * * * After the Chinaman had concluded his statement, McCrea remarked: That will do; I can prove where I was that day; which was all he said in the conversation."

Admissions and confessions may be implied from the acquiescence of the party in the statements of others made in his presence, when the circumstances are such as afford an opportunity to act or speak, and would naturally call for some action or reply from men similarly situated. (1 Greenl. Ev. secs. 197, 215; Joy on Confessions, 77.) And it makes no difference that the statements which call for a reply are made by a party who is incompetent to testify.

In Rex v. Bartlett, 7 Car. & P. 832, on a trial of an indictment for murder, the following statement of the wife, in presence of the husband, the defendant in the case, and his reply, were offered in evidence. The statement of the wife was as follows: "Oh, Bartlett, how could you do it?" He looked steadfastly at her and said: "Ah! what! you accuse me of murder, too!" She said: "I do, Bartlett; you are the man that shot my mother." The prisoner did not make any reply. She then turned to the witness, and said: "This is done for money." This testimony was held admissible. In Rex v. Smithies, 5 Car. & P. 332, also an indictment for murder, effected by setting fire to a house, it was held that *"observations made to the prisoner by his wife on [101] the subject of the fire, to which he made an evasive

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reply," were admissible. The Judges said that the fact that the wife "could not be called as a witness did not vary the general rule, that whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, was receivable as evidence of an implied admission on his part." (See also Neile *v.* Jakle, 2 Car. & K. 709.) The rule recognized by these authorities is clearly broad enough to cover the testimony in question. Bnt these statements are admitted, not as of themselves evidence of the truth of the facts stated, but simply to show what it is that calls for a reply, and the action of the defendant himself under the circumstances, as indicating an acquiescence in, or repudiation of, the truth of the statement. His own action under the circumstances in which he is placed is the matter to be considered and weighed by the jury. The degree of credit due to such evidence of implied admissions is to be estimated by the jury under the circumstances of each case. But jurors should be cautioned not to allow their attention to be diverted from the conduct of the prisoner—the real matter to be considered—to the statements of the third party, as containing the evidence of the facts sought to be established. To do so, would be to receive and give effect to statements which, except for the purpose of showing the circumstances under which the prisoner is called upon to act or speak, would be wholly inadmissible. The prisoner, at best, is taken at a disadvantage, and is bound to reply or not reply, at his peril, to the inquiries or statements of any officious intermeddler who may be able to obtain access to him. There was no error in admitting this testimony; but the jury are to judge whether the action or answer of the defendant was, under all the circumstances, entitled to any, and how much weight, as indicative of an admission of guilt.

The judgment must, however, be reversed, and a new trial had, in consequence of other errors noticed, and it is so ordered.

98

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*ISAAC WILKINSON v. JOHN PARROTT. [102]

CONTINUANCE.—It is not an abuse of discretion for the Court to refuse a continuance on account of the voluntary absence of the defendant on important business at the time the case has been set for trial, when it does not appear that the business could not have been delayed, nor could not have been attended to by some one else, nor that the facts were not in the possession of his attorney.

[1] DAMAGES FROM BITE OF DOG.—It is not necessary, in an action for damages sustained by the bite of a dog, for the plaintiff to prove that the defendant owned the dog. It is sufficient on this point for the plaintiff to prove that the defendant kept the dog.

EXCEPTIONS TO INSTRUCTIONS.—Instructions given by the Court to the jury must be excepted to, in order to enable the appellant to take advantage of errors in them if such exist.

REVERSAL OF JUDGMENT.—A judgment will not be reversed for an error favorable to the appellant.

NEW TRIAL.—A judgment will not be reversed on the ground that the verdict is contrary to the evidence, if the testimony is conflicting.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

Plaintiff recovered judgment in the Court below, and the defendant appealed.

The other facts are stated in the opinion of the Court.

E. Casserly and *W. H. L. Barnes*, for Appellant,

Argued that the defendant was not liable unless he owned the dog; and cited Ficken *v.* Jones, 28 Cal. 618; Hinckley *v.* Emerson, 4 Cow. 351; Brock *v.* Copeland, 1 Esp. 203; Vrooman *v.* Lawyer, 13 Johns. 339; Lyke *v.* Van Leaver, 4 Denio, 128, *i. e.*, 1 Coms. 515; Steele *v.* Smith, 3 E. D. Smith, 322; Coggswell *v.* Baldwin, 15 Vt. 412; Deane *v.* Clayton, 7 Taunt. 409.

James McCabe, for Respondent.

The case of Ficken *v.* Jones, 28 Cal. 618, (so strongly relied upon by defendant's counsel,) when closely examined, plainly shows—as does also Abbot's Forms, Nos. 442 to 444, and 536 to 538—that the defendant may be liable, though not

[1] Distinguished, Baker v. Kinsey, 38 Cal. 634.

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the owner. Ficken *v.* Jones also shows that negligence is enough to render the defendant liable without the [103] *scienter*, *and in the case at bar it is clearly proved that Parrott negligently left his gate open so his dog could run out.

By the Court, SANDERSON, J.:

Action to recover damages on account of personal injuries sustained by plaintiff's daughter, a child about four years of age, from a bite by defendant's dog.

When the case was called for trial in its regular place on the calendar, counsel for defendant moved the Court to postpone the trial for the space of three days on account of the temporary absence of the defendant. The motion was based upon the affidavit of the business associate of the defendant to the effect that the defendant had gone to the State of Nevada a few days previous to the motion on important private business, and that the affiant knew nothing about the facts of the case, but believed that it would be impossible to try it without the defendant's presence, as the facts were altogether within his knowledge, and that he did not know when the defendant would return, but he expected him to do so within a few days.

The refusal of the Court to postpone the trial upon such a showing did not amount to an abuse of discretion. There is nothing in the affidavit which entitled the defendant to an adjournment, unless his voluntary absence unexplained is sufficient for that purpose. It is not even suggested that the defendant was ignorant of the fact that his case was set for trial on that day, or that the business upon which he absented himself was of such a character as to require his personal attention, or was so pressing as to admit of no delay. It may have been very important and yet have been attended to by some one else as well. It may have been very important, and of a character to require his personal attention, and yet have been delayed for a few days without prejudice. Moreover, there is nothing to show that his attorney was not in possession of all the facts, and as well prepared to try the case without him as with him. At all events, his attorney was careful

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*not to make an affidavit that he was not. And the [104] affidavit, such as it was, was made by a party who neither knew nor could be reasonably expected to know anything on that head. While we are not prepared to say that the Court would have abused its discretion had it granted the motion, we have no hesitation in saying, in view of the meagre showing which was made, that it did not abuse its discretion in denying it.

It is next claimed that the verdict is contrary to the evidence on all the points which the plaintiff was bound to establish. In this connection it is claimed that it was necessary for the plaintiff to show: First—That the defendant was the owner of the dog. Second—That the dog was of vicious and mischievous propensities and accustomed to bite mankind. Third—That the defendant had knowledge of these characteristics; and, Fourth—That the defendant allowed the dog to run at large without being properly guarded and muzzled.

It is not necessary in order to make a case for the jury to show that the defendant was the owner of the dog. If such was the case it would be necessary to so aver in the complaint; yet neither the complaint in this action nor the precedents so aver. It is sufficient if the defendant, in the language of the complaint and of the precedents, kept the dog, and this he might do without being his owner or having any right of property in him. If a party undertakes to keep a vicious dog or other animal, whether he owns him or not, he is bound to keep him, if he knows him to be vicious, in such a manner as not to endanger the lives or persons of others. But for the purposes of this case, all that counsel claim on this head may be conceded, for the testimony on the question of ownership was conflicting, which precludes us from interfering with the verdict, and the Court below adopted the view of counsel, and expressly charged the jury that the first question they had to settle was as to the ownership of the dog, and that if they came to the conclusion that he did not belong to the defendant they must find a verdict in his favor.

That the dog was vicious, and that defendant knew it, was shown by the admission of the defendant to the plaintiff, that *"it was the second time the dog had bitten [105]

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a child." That the dog, being a vicious dog, was not properly secured, is shown by the circumstances attending the biting. The child was passing quietly along the street in company with her mother, when the dog, without any provocation, ran out of the defendant's premises and inflicted the injuries of which complaint is made. There is, in short, nothing in the evidence which would justify us in disturbing the verdict of the jury.

The instruction in relation to punitive damages, which the Court refused, we pass without comment, because counsel have done so in their brief, and we therefore understand them as abandoning their exception to the ruling of the Court in that respect. Moreover, the whole amount of the damages allowed by the jury was only three hundred and twenty-five dollars, which sum, if at all, is too little in excess of the expense and loss of time entailed upon the plaintiff to justify the belief that any portion of it was allowed by way of punishment.

The second instruction asked for by defendant was properly refused, as we have seen, because it made the ownership and not the keeping of the dog one of the tests of the defendant's liability.

Whether the instructions which were given by the Court were in any respect erroneous, matters not, for counsel failed to take any exception to any part of them. So far as they make the ownorship and not the keeping of the dog a test of the defendant's liability, they were erroneous, as we have seen, but the error was favorable to the appellant. Whether they were erroneous so far as they relate to punitive damages is of no consequence, for there is no substantial reason to suppose that punitive damages were allowed by the jury; besides, as already stated, no exception was taken.

Judgment and order denying a new trial affirmed.

Mr. Chief Justice CURREY did not express any opinion.

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*S. H. WETHERBEE v. MARY DUNN et als.[1] [106]

RECITALS IN TAX DEED.—It is not necessary in the recitals in a tax deed, given for land sold for the taxes of 1857-8, to state in what manner the tax had been levied or the rate of taxation, nor for what amount the land was assessed by the Assessor, nor that a certificate of sale was filed with the County Recorder.

TAX COLLECTOR.—It is not necessary, before introducing a tax deed in evidence, to prove that the person by whom it was executed held the office of Tax Collector at the time when the sale was made.

DEED AS EVIDENCE.—A tax deed properly acknowledged is admissible in evidence without further proof.

OF WHAT COURTS WILL TAKE JUDICIAL NOTICE.—Courts will take judicial notice of the fact as to who holds the office of Tax Collector of a county or district, and as to who fills the various county offices within their jurisdiction, and of the genuineness of their signatures.

DESCRIPTION IN ASSESSMENT AND TAX DEED.—A tax deed which describes the property conveyed as "Block No. 25, less a lot belonging to Bryant, 70 by 137½, in the southeasterly corner," is not void on the ground that the description of the premises is insufficient, nor because it was assessed by that description.

CROSS-EXAMINATION.—Where a witness testified in chief that a piece of land was assessed for taxes, it is not a cross-examination to ask him the usual way of selling property for taxes, or whether another piece of land was sold for taxes.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

On the trial, the plaintiff offered in evidence the tax deed to his grantor, without proving that the person who executed it was the Tax Collector, or the genuineness of his signature. The recitals in the deed did not state in what manner the tax had been levied, the rate of taxation, nor for what amount the land had been assessed by the Assessor, nor that a certificate of the tax sale had been filed with the County Clerk. The defendants objected to its reception for these among other reasons, and the Court overruled the objections.

The plaintiff called a witness, who testified that Mr. Bryant had a portion of "Block 25" assessed to him in 1857-8. On cross-examination, defendants' attorney asked the witness to state the usual way of selling property for taxes at that time, and then offered to prove by him that neither the owner nor the Tax Collector was present at the sale, and that the lot was

[1] Referred to in same case, 36 Cal. 149.

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not sold. Plaintiff's attorney objected, as not proper cross-examination, and the Court sustained the objection.

[107] *The other facts are stated in the opinion of the Court.

G. F. & W. H. Sharp, for Appellants.

The filing with the County Recorder of the certificate of sale is a condition precedent to the making of a tax deed, or a condition subsequent to the sale. Such filing should have been proved by the plaintiff; without such proof his deed was void, for non-compliance with said condition. (Stat. 1857, p. 334, secs. 20, 22, and 23; Blackwell, 369, 404–5; Reed. *v.* Morton, 9 Mo. 878.) The recitals in the tax deed were insufficient to make the deed *prima facie* evidence. (Terrell *v.* Graves, 18 Cal. 149; Barker *v.* Blake, 36 Me. 433.)

John Reynolds, for Respondent,

On the point of the recitals in the deed, cited O'Grady *v.* Barnhisel, 23 Cal. 287. and Brunn *v.* Murphy, 29 Cal. 326.

By the Court, SANDERSON, J.:

Ejectment to recover part of block number twenty-five, in the city of San Francisco. The plaintiff had judgment, and the defendant appealed.

The plaintiff's title is founded upon a sale of the premises by the Tax Collector for taxes of 1857–8, made under the Revenue Act of 1857, (Stat. 1857, p. 325,) and the act of 1859, (Stat. 1859, p. 4,) legalizing the tax list of the city and county of San Francisco for the fiscal year ending June 30, 1858. In support of his title, he offered in evidence a deed from the Tax Collector to one Vassault, under whom he claims. The defendant objected to the deed upon a variety of grounds affecting its validity. It is unnecessary to notice them in detail. So far as they relate to the historical part of the deed, they are fully answered by the cases of O'Grady *v.* Barnhisel, 23 Cal. 287; and Brunn *v.* Murphy, 29 Cal. 326. On comparing the recitals in the deed with the provisions of the eighteenth section of the statute under which they were prepared, we find no fault.

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*Nor was it necessary before introducing the deed [108] to prove that the person by whom it was executed held the office of Tax Collector at the time the sale was made. There is some conflict as to how far Courts should go in the exercise of judicial knowledge in respect to who are occupants of inferior offices and tribunals. It is settled that they will take notice of who are the principal officers of the State, heads of Departments, foreign Ministers, United States Senators, Marshals, Sheriffs, and the like, and the genuineness of their signatures. In Louisiana, the Courts take notice of the signatures of all executive and judicial officers to all official acts. (Jones v. Galis' Curax'r, 4 Mart. 635; Wood v. Fitz, 10 Mart. O. S. 196; Follain v. Lefevre, 3 Rob. 13; Despau v. Swindler, 3 Mart. N. S. 705.)

The general rule upon this subject is, that Courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. (1 Greenleaf Ev. 11.) We think that the Courts ought at least to go so far as to take notice as to who fill the various county offices within their jurisdiction, and the genuineness of their signatures. But independent of this, the deed in question was properly acknowledged before a competent officer, and therefore entitled to admission without further proof.

Nor was the deed void on the ground that the description of the premises is insufficient. The premises are described as constituting block number twenty-five less a lot belonging to Bryant, seventy by one hundred and thirty-seven and a half, in the southeasterly corner. It is also described by giving the streets by which it is bounded. We think it sufficient both for the purposes of assessment and conveyance. But if not, the defect was cured by the act of 1859, already mentioned. (People v. Halladay, 25 Cal. 300.)

Nor did the Court err in excluding the testimony offered by the defendants for the purpose of defeating the tax sale. They offered the testimony by cross-examination of one of the plaintiff's witnesses, and as it did not tend to rebut anything which that witness had said upon the direct examination, it was properly excluded upon the objection of plaintiff to that mode

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[109] *of proof. So far as we can learn from the transcript, the offer was not subsequently renewed.

There is nothing in the other points deserving of special notice. The plaintiff showed a right to recover on his tax title, and the Court did not err in so advising the jury.

Judgment affirmed.

Mr. Chief Justice CURREY did not express any opinion.

ABNER REED AND JOSEPH GORDON v. DAVID CALDERWOOD.

DENIALS IN ANSWER.—If several averments in a complaint are conjunctively stated, an answer attempting to deny them by repeating them in their conjunctive form does not raise an issue.

AVOIDING ADMISSION IN ANSWER.—If a complaint to quiet title avers plaintiffs possession, and the answer admits the averment, this admission is not avoided by a special averment that plaintiff obtained possession by colluslon with defendant's tenant.

ACTION TO QUIET TITLE.—Possession in plaintiff is necessary in an action to quiet title; but if the possession exist it matters not how it was acquired.

PLEADINGS.—If the answer in an action to quiet title admits plaintiffs' ownership in fee simple and possession, the rightfulness of the possession follows the admission, and even if plaintiff went into possessiou by leave of defendants' tenant, he is not estopped from denying defendants' title.

INJUNCTION IN ACTION TO QUIET TITLE.—If plaintiff prevail in an action to quiet title, a decree inserted in the judgment enjoining defendant from making any further contest on plaintiffs' title, even if not strictly correct, does not injure defendant. Such decree does not preclude defendant from availing himself of an after acquired title.

ACTION TO QUIET TITLE.—A judgment for plaintiff in an action to quiet title is a bar to subsequent litigation on the same subject-matter.

APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

Plaintiffs averred in their complaint "that they now are and for several years last past have been the owners in fee simple absolute, and in the possession and rightfully entitled to the possession of" (here followed a description of the land.)

Defendant in his answer denied "that plaintiffs now are and for several years last past have been the owners in fee

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simple or *otherwise, or in the possession, (except as [110] herinafter alleged,) or entitled to the possession of the land and premises described in the complaint." The pleadings were verified.

The other facts are stated in the opinion of the Court.

David Calderwood, in *pro per.*, for Appellant,

Argued that the answer denied plaintiffs' title and possession, except as obtained by collusion with his tenant, and that plaintiffs were not in a position to maintain this action.

S. M. Wilson and *A. P. Crittenden*, for Respondents,

Argued that the denials were not good, and that the whole denial of plaintiffs' title and possession applied to time—that is, "several years last past."

By the Court, SHAFTER, J.:

Action to quiet title under the two hundred and fifty-fourth section of the Practice Act. The case was tried by the Court. Finding and judgment for plaintiff. The appeal is from the judgment and order denying defendant a new trial.

The allegation in the complaint that the plaintiffs own the premises in fee simple absolute is not denied, and no evidence was introduced tending to prove that the lot belonged to the defendant, as averred in his special answer.

The averment of the plaintiffs that they were in possession at the commencement of the action, is not effectually denied, under the decision (Fish *v.* Redington, 31 Cal. 185.) The possession so admitted was not avoided by the special answer charging that the plaintiffs obtained possession by collusion with defendant's tenant. Possession was alleged for the purpose, primarily, of showing, not that the plaintiffs owned the land, but that they stood in that relation to the land on which the right to the particular remedy is by statute made to depend. To that intent it is a matter of no moment how the possession was acquired. (Dupuy *v.* Williams, 26 Cal. 310.) It may be true, inasmuch as the admission of the fact of possession is coupled with a statement that plaintiffs got in by a *collusive arrangement with defendant's tenant, [111]

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that the answer cannot be treated as an admission that plaintiffs were in possession rightfully, but that the possession was by right is involved in the other admission that the plaintiffs own the lot in fee simple.

It cannot be claimed that the plaintiffs are estopped from denying the defendant's title on the ground that they came into possession by the leave of defendant's tenant, admitting such to have been the fact; for the admission that the plaintiffs own in fee simple occurs, in effect, in the very plea in which the estoppel is asserted.

It may be admitted that the plaintiffs were not in strictness entitled to a decree enjoining the defendant from making any further contest on the plaintiffs' title—whether judicially or otherwise; still the error must be disregarded, for it cannot affect any substantial right of the party. The decree would have been a bar to subsequent litigation on the same subject-matter, if the injunction clause had been omitted; and that clause may be of positive service in preventing the bringing of suits by the defendant which if brought would be sure to fail. The defendant, however, is mistaken in supposing that the injunction will preclude him from availing himself of an after acquired title.

Judgment affirmed.

BERNARD S. FOX, GUARDIAN OF THE PERSON AND ESTATE OF CATHARINE FOLEY, a MINOR, *v.* P. O. MINOR, AND J. R. WILSON.

TRUSTEE OF EXPRESS TRUST.—A guardian of an infant, appointed by the Probate Court, is not a trustee of an express trust within the meaning of section six of the Practice Act.

[1] PARTY PLAINTIFF.—A guardian of an infant cannot sue in his own name to recover money due the infant. Such action must be brought in the name of the infant by his guardian.

GUARDIAN CANNOT DISPUTE LEGALITY OF HIS APPOINTMENT.—One who has been appointed guardian of an infant minor by the Probate Court, and has accepted the appointment, and by virtue thereof become possessed of the infant's estate, is [112] *estopped from denying the jurisdiction of the Court or the legality of his appointment.

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[1] Cited, Wilson *v.* Wilson, 36 Cal. 451; Karr *v.* Parks, 44 Cal. 48.

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[1] JUDGMENT ON BOND OF GUARDIAN.—In an action against the sureties upon a bond given by the general guardian of an infant minor, but not made payable in any specific kind of money, a judgment should not be rendered payable in gold coin.

APPEAL from the District Court, Third Judicial District, Santa Clara county.

On the 22d day of May, 1861, the Probate Court of Santa Clara County appointed the defendant, John R. Wilson, guardian of the person and estate of Catharine Foley, a minor under the age of fourteen years. Said defendant qualified and gave a bond, with the defendant Minor and one H. C. Malone as sureties, and letters of guardianship of the person and estate of said Foley were issued to him. Wilson continued to act in the capacity of guardian until the 25th day of March, 1865, when he tendered his resignation, and the same was, on the 6th day of May, 1865, accepted by the Probate Court. During his guardianship, Wilson received and collected for and on account of his said ward, the sum of two thousand dollars, in gold coin of the United States, which he failed to invest or employ for the benefit of his ward, either under the directions of the Probate Court or otherwise, but used the same for his own gain. Before accepting Wilson's resignation, the Probate Court investigated his accounts and found him indebted to his ward in the sum of two thousand dollars. After Wilson's resignation had been accepted, the Probate Court appointed Bernard S. Fox, the plaintiff, guardian of the person and estate of said Catharine Foley, who qualified and received letters of guardianship. This action was brought by said Fox upon the bond of Wilson, to recover the money due his ward. The plaintiff in the action was "Bernard S. Fox, guardian of the person and estate of Catharine Foley, a minor." The suit was commenced August 28th, 1865. The bond of Wilson and his sureties was filed in the Probate Court May 27th, 1861. The following is a copy of the bond:

"*Know all men by these presents: That we, John [113] R. Wilson, Henry C. Melone, and Peter O. Minor, are held and firmly bound unto Catharine Foley, minor, in the

[1] Approved, Mendocino Co. v. Morris, post 145.

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sum of four thousand dollars, lawful money of the United States of America, to be paid to the said Catharine Foley, minor, for which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

"Sealed with our seals, and dated this 21st day of May, 1861.

"The condition of the above obligation is such, that whereas application has been made to the Judge of the Probate Court of the county of Santa Clara, State of California, for the appointment of John R. Wilson guardian of the person and estate of the said Catharine Foley. Now, therefore, if the said John R. Wilson be appointed such guardian, and shall faithfully perform the duties of his trust according to law; and shall:

"First—Make a true inventory of all the estate, real and personal, of his said ward, that shall come to his possession or knowledge, and shall return the same within such time as the said Judge shall order;

"Second—Shall dispose of and manage all such estate according to law and for the best interest of said ward, and faithfully discharge his trust in relation thereto, and also in relation to the care, custody, and education of said ward;

"Third—Shall render an account on oath of the property, estate, and moneys of said ward in his hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within one year after his appointment, and at such other times as the Court shall direct; and

"Fourth—At the expiration of his trust shall settle his accounts with the Probate Judge or with the said ward, if she be of full age, or with her legal representatives, and shall pay over and deliver all the estate, moneys, and effects remaining in his hands or due from him on such settlement, to the person or persons who shall be lawfully entitled thereto;

[114] *"Then this obligation shall be void and no effect; else to remain of full force and virtue.

"JOHN R. WILSON, [SEAL.]
"H. C. MELONE, [SEAL.]
"P. O. MINOR." [SEAL.]

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"STATE OF CALIFORNIA,
"County of Santa Clara.

"H. C. Melone and Peter O. Minor being duly sworn, each for himself, says that he is a resident in said State, and is worth the sum of four thousand dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

"H. C. MELONE,
"P. O. MINOR."

"Subscribed and sworn to before me, this twenty-first day of May, 1861.

"GEO. M. YOELL, Notary Public."

"Approved this twenty-second day of May, 1861.

"JOHN H. MOORE, County Judge,
"And *ex officio* Judge of the Probate Court."

"Filed May 27th, 1861.

"JOHN B. HEWSON, Clerk.
"By LEVI P. PECK, Deputy Clerk."

The judgment of the Probate Court upon the accounts of Wilson was rendered May 6, 1865. The defendants demurred to the complaint, because the action was brought in the name of the guardian as such, and not in the name of the ward by her guardian. The Court below overruled the demurrer. Plaintiff recovered judgment for two thousand dollars, payable in gold coin, and defendants appealed.

Frederick Hall, for Appelant Minor, and *J. M. Williams*, for Appellant Wilson,

Argued that the action should have been brought in the name of the ward by her guardian; and cited sec. 40 Guardians' Act; 19 Cal. 629; 20 Cal. 659; 1 Pet. *46; [115] and 3 Hill, 612; and that the guardian was not the real party in interest, and was not the trustee of an express trust; and cited 10 Paige, 239; and Morris, Iowa, 436. They also argued that the Court below had no authority to render a judgment for gold coin, because the bond was dated before the passage of the Specific Contract Act, and there was no

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identity of any particular money as a trust fund; and cited Lathrop *v.* Bampton, 31 Cal. 17. They also claimed that Wilson had never petitioned to be appointed guardian, and that the Probate Court had therefore never acquired any jurisdiction to make the appointment, and the same was void.

S. O. Houghton and *J. A. Yoell*, for Respondent,

Argued that the action was properly brought in the name of the guardian; and cited Practice Act, sec. 6; and Act concerning Guardians, sec. 162; and that a general guardian had all the elements of a trustee of an express trust, and had a qualified property in the proceeds of the action, under the statute and at common law, and in that respect differed from a guardian *ad litem*, who had no interest in or claim of control of the subject-matter of the action. They argued also that defendants could not raise any objections to the regularity or sufficiency of the proceeding of the Probate Court in the appointment of Wilson; and cited Gonfier *v.* Puymirol, 19 Cal. 629; and People *v.* Norton, 5 Seld. 176. They further argued that the judgment for gold coin was right, because the money was received in a fiduciary capacity. To show that the action was properly brought in the name of the guardian, they made the following points and cited the following authorities:

When the complaint shows that the action is by the trustee for the benefit of his *cestui que trust*, and that defendant would be protected by the judgment, the action is allowed in the name of the trustee. (Fenn *v.* Craig, 3 Younge & C. 216; Story's Eq. Pl. sec. 150; and 2 Paige, 18.) The party having the legal title can sue. (Mellen *v.* Hamilton Co., 17 N. Y. 609.) An executor or administrator may sue in his own name, or as executor, for the debt due his testator or
[116] *intestate at the time of his death. (2 Seld. 168; Pugh *v.* Currie, 5 Saund. 433; 19 Barb. 473; 9 Wend. 302; and 9 How. Pr. 11.) The analogy between an executor and an administrator and a guardian is too close to be disregarded. A guardian has title to the possession of his ward's estate, both real and personal, and cannot be ousted of it. (4 Bac. Abr. 557.) Fox is not a mere nominal trustee, but the party

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to whom the money must come. (Maulin *v.* Maulin, 2 John. Ch. 239.)

By the Court, SAWYER, J.:

A guardian appointed by the Probate Court, under the act which provides for the appointment and prescribes the duties of guardians, is not a trustee of an express trust, within the meaning of section six of the Practice Act. Under that act the Probate Court is vested with the same jurisdiction over the persons and estates of minors who have no testamentary guardians, as was vested at common law in the Court of Chancery. At common law, the King, as *parens patria*, was considered to have the care of all persons who were unable to take care of themselves, and such care was exercised by the Court of Chancery. Upon petition or bill showing that a minor was without any testamentary or other legal guardian, that Court took charge of his person and estate, and cared for both by appointing a guardian of his person and estate. Such minors became the wards of the Court, and the guardian appointed by the Court was but an officer of the Court, and held responsible to it as such. The Court was, in effect, the guardian, and the nominal guardian was but the agent through whom the Court acted, and to whom the Court delegated the execution of the trust. In like manner, a guardian appointed by the Probate Court is an officer of that Court, and exercises only a delegated trust. His relation to the Court and the minor is in some, though not all, respects of the same legal complexion as that of an executor, or administrator towards the Court, estate, and heirs of a decedent, neither of which is *within the definition of a trustee of an ex- [117] press trust, as given in the sixth section of the Practice Act. It is possible, as contended by respondent, that there is no good reason why a guardian should not be placed, in respect to his capacity to sue, upon the same level as executors and administrators; but it is clear that such is not the case. So far as the Practice Act is concerned, when not a trustee of an express trust within the meaning of section six, the capacity of a guardian to sue in his own name, if at all, is limited to actions for the injury or death of his ward, (sec. 11;) while

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executors and administrators are expressly authorized to sue in their official character without joining the person beneficially interested. (Sec. 6.)

The reason upon which the distinction is based may be that executors and administrators are strictly and technically representatives of the deceased, while guardians are not technically representatives of anybody. They simply stand in the position of protectors. The guardian is the counsel assigned by operation of law to conduct the suit. (Devore *v.* Pitman, 3 Mo. 187.) If a guardian were permitted to maintain an action in his own name, there might be two suits pending at the same time for the same cause of action—one in the name of the infant, and another in the name of the guardian—and the determination of the question in the suit brought in the name of the guardian alone might not protect the defendant from further litigation in the name of the ward. (Bradley *v.* Amidon, 10 Paige, 239.)

At common law, and in equity, an infant was required to sue in his own name, but by his guardian or next friend. (1 Chit. Pl. 284; Bradley *v.* Amidon, 10 Paige, 235; Hanly *v.* Levin, 5 Ohio, 228.) The Practice of suing by guardian is expressly continued by our Practice Act. "Where an infant is a party he shall appear by guardian" (sec. 9); and section ten provides for appointing a guardian "where an infant is a plaintiff," or a "defendant." These provisions for appointing guardians refer to those cases where there is no general guardian, or where, for any other sufficient reason, a [118] guardian, *ad *litem* is required. But these provisions contemplate that the infant in person shall be a party to the suit, although he appears by guardian, as adults appear by attorney. Would it be pretended that an action could be maintained against a guardian in his own name alone upon a cause of action against his ward only? What better reason is there for permitting him to sue alone, than for permitting a suit to be maintained against him in his own name, on a cause of action against another party? The Practice Act upon this subject, then, so far as the guardian is concerned, is in strict harmony with the practice at common law; and, unless expressly modified by some other statutory provision,

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it must govern. It also provides that an action, with certain specified exceptions, of which this is not one, shall be prosecuted in the name of the real party in interest. (Sec. 4.) The ward is the real party in interest. The only other provisions of the statute bearing upon the question, to which our attention has been called, are contained in secs. sixteen and forty of the act concerning guardians. Section sixteen provides that "every such guardian shall also settle all accounts of the ward, and demand, sue for and receive all debts due him, or may, with the approbation of the Probate Judge, compound for the same, and give a discharge to the debtor on receiving a fair and just dividend for his estates and effects; and he shall appear for and represent his ward in all legal suits and proceedings, unless when another person is appointed for that purpose, as guardian or next friend." (Stat. 1850, p. 270, sec. 16; Hittell, 3377.) But this proviso does not say that the suit shall be in the name of the guardian. It simply designates the powers and duties of the guardian, and is only a re-enactment of the common law upon the subject. There is nothing in this section inconsistent with the provisions of the Practice Act, which contemplates that the suit shall be in the name of the infant—the real party in interest. And those provisions are not to be construed as repealed unless by some express provision, or by necessary implication. Besides, the express provision of section forty of the same act shows that no such change was *contemplated, especially with reference to suits on a [119] guardian's bond. This section provides that "every bond given by a guardian shall be filed, * * * and in case of the breach of any condition thereof, may be prosecuted in the name of the ward for the use and benefit of such ward, or of any person interested in the estate." (Id. 274, sec. 40; Hittell, 3401.) This point was directly decided by the Supreme Court of Iowa, in a similar suit, under a statutory provision in all respects substantially like section sixteen of our act, and it was held that the suit could not be maintained in the name of the guardian alone. (Anderson, guardian of W. P. Anderson v. Cameron, Morris, 437.) We think a suit on the bond can only be maintained in the name of the infant, the real

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party in interest, and that the complaint states no cause of action in favor of the plaintiff. It has been a very general practice in this State—from abundant caution, perhaps—to have a guardian *ad litem* appointed in pursuance of section eleven of the Practice Act, even where there is a general guardian, the general guardian being usually appointed when there is no objection to his acting. But this practice is held not to be necessary when there is a general guardian who has been duly appointed, against whom no objection lies. (Gronfier *v.* Puymirol, 19 Cal. 632; Spear *v.* Ward, 20 Cal. 673.)

There are some other points presented by the record which have been fully argued, and which will necessarily arise should a new suit be brought in the name of the proper party, and for that reason we will dispose of them now.

Neither Wilson nor his sureties can be heard to say that Wilson was not legally appointed guardian. Having accepted the appointment, and by virtue thereof become possessed of the minor's estate, it would be strange indeed if he could now dispute the jurisdiction of the Court, and under the pretence that the Court had acted without authority, retain the estate of his ward. By accepting the appointment and the estate, Wilson placed himself within its jurisdiction and became an officer of the Court, and responsible to it for the faithful performance of his trust, and he is forever estopped by
[120] the record *from denying his accountability. (People *v.* Norton, 9 N. Y. 179.)

The judgment of the Probate Court is conclusive against Wilson and his sureties alike. We so held in Irwin *v.* Backus, 25 Cal. 214, and we adhere to that decision.

The District Court was not authorized to enter a judgment payable in gold coin against the sureties, and in this respect there was error. The action is not upon a contract "for the direct payment of money made payable in a specific kind of money or currency." The obligation is to pay "the sum of four thousand dollars, lawful money of the United States," without otherwise specifying the kind of money. The condition was that Wilson should perform his duties as guardian, not that the obligors would perform Wilson's duties. It may be that Wilson as guardian in a proper suit can be compelled

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to pay over to the infant the amount of money received by him in his fiduciary capacity, in the specific kind of money received; but in a suit on the bond the sureties are entitled to stand on the terms of the undertaking. The only recovery that can be had on the bond is the damages resulting from Wilson's failure to discharge his duties in the mode prescribed by law, and the damages can only be required to be paid in money generally according to the terms of the bond.

Judgment reversed, with directions to the District Court to dismiss the action.

Mr. Justice RHODES, being disqualified, did not participate.

SANDERSON, J. dissenting:

Being unable to agree with my associates in the conclusion which they have reached, I will suggest briefly the grounds of difference between us.

I agree with them in holding that the action should have been brought in the name of the ward, but I do not think it follows that the action should be dismissed. If, as we hold, the action should have been brought in the name of the ward *by her guardian, it follows that the latter is [121] a proper and necessary party to the record. This is not then a clear case of a suit brought by the wrong party, but is, instead, a case where one of two proper parties has been omitted. If so, the omission may be supplied by amendment. "The Court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of a party." (Pr. Act, sec. 68.) Our statute touching amendments is wisely indulgent, and the Courts should not be less. There is no satisfactory reason why the ward cannot be added as a party and the action allowed to survive the judgment of this Court.

Suppose the Statute of Limitations had run pending the present action, and would therefore be available to the defendants in bar of a second action, would not this Court have the power to save the cause of action from the bar of the statute by allowing the requisite amendment? To do so

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would be "in furtherance of justice," and not to do so would be very much like a denial of justice; yet if it could be done in the event supposed, it can be done now. To allow the amendment would not force the statute; on the contrary, it would be giving effect to its letter and spirit. Parties should not be sent out of Court and subjected to the costs and hazards of a second action on a mere technicality which can be obviated by amendment. It may not be so in the present case, but any one can readily perceive how prejudice may result from such a course. That the administration of justice can be subserved or advanced by such a course, it is presumed, no one will pretend.

I also agree with my associates in adhering to the rule in Irwin *v.* Backus, 25 Cal. 214, but I differ with them as to the consequence which follows.

Irwin *v.* Backus was the case of an administrator, and the action was upon his official bond; but it is not therefore distinguishable from this. On the score of principle the two cases are identical. Administrators and guardians are [122] alike *officers of the Probate Court, and are alike charged with the execution of a delegated trust. In legal effect, their bonds are the same, and their sureties, in all legal respects, stand upon the same level. Hence, whatever was said in Irwin *v.* Backus is no less applicable to the present case. It was there said: "As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal unless they have had their day in Court or an opportunity to be heard in their defence; but administration bonds seem to form an exception to this general rule, and the sureties thereon, in respect to their liability for the default of the principal, seem to be classed with such sureties as covenant that their principal shall do a particular act. To this class belong sureties upon bail and appeal bonds, whose liability is fixed by the judgment against their principal. This distinction seems to be founded upon the terms of the obligation into which the sureties upon an administration bond enter, which are that their principal shall faithfully perform all the duties imposed upon him by the nature of his trust, and will account for and pay over all money which

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may come into his hands pursuant to the orders and decrees of the Probate Court. The account must be rendered to and settled by the Court, and the money must be paid out and distributed by and pursuant to the orders and decrees of the Court, and the undertaking of the sureties is that their principal will do all this. * * * Such are the terms of the contract, and upon the refusal of the administrator to obey such order or decree the liability of the sureties attaches, and they are bound to make good the default of their principal, and cannot go behind the decree to inquire into the merits. They may show in defence that the bond was not made; or that the decree was not made, or if made, that the same has been obeyed; or that the same was obtained by fraud or collusion; but they cannot show that the Court has erred in making the decree, or that no assets ever came into the possession of the administrator, although the Court has so found and adjudged. If any error has been committed, a remedy is afforded by appeal. Until the order or decree is *reversed, it is equally conclusive upon the administra- [123] tor and his sureties."

Strike from the foregoing language the word "administrator" and substitute the word "guardian," and there will be nothing left which is not strictly applicable to the present case. This my associates admit when they say: "The judgment of the Probate Court is conclusive against Wilson and his sureties alike. We so held in Irwin *v.* Backus, 25 Cal. 214, and we adhere to that decision." After the use of such language, one would naturally expect to find the guardian and his sureties standing, at the outcome, upon the same level as to the order of the Probate Court which was made in this case, yet it is not so, for it is expressly determined that the guardian may be compelled to obey the order of the Probate Court and pay gold coin, but that his sureties cannot. Now, I respectfully submit that both of these propositions cannot be true.

Irwin *v.* Backus says: "That the order of the Probate Court, however erroneous, is alike conclusive upon the guardian and his sureties, until reversed on appeal." Fox *v.* Minor (the present case) says: "What Irwin *v.* Backus says

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upon this subject is true beyond a doubt; but still, I am of the opinion that the order of the Probate Court, although it has never been reversed on appeal, is not conclusive upon the guardian and his sureties alike, and hence the latter cannot be made to pay gold, although the former can." Now, I will not undertake to say that these two cases cannot be reconciled; but I may be permitted to say that the process of reasoning by which such a result can be reached does not occur to me.

What do we mean when we say that an order or decree is alike conclusive upon two or more parties? Do we not mean that the one is as much bound by it as the other? That the one cannot dispute it if the other cannot? Such is my understanding, and such, in my belief, is the understanding of the profession generally; and I therefore submit that under the rule in Irwin *v.* Backus, the order of the Probate
[124] Court in *this case is as conclusive upon his sureties as it is upon the guardian himself.

It must be borne in mind that this is not an appeal from the order of the Probate Court, but is a collateral action, in which the plaintiff counts upon the order as a part of his cause of action, and brings it forward as evidence in support of his count. If the order was here on appeal, we might review it on the score of error; but in its present relation, we cannot notice any error if it exists. If the Probate Court had no jurisdiction to make the order, we could entirely disregard it as being null and void; but we cannot disregard it or modify it on the ground of error. This doctrine is too familiar to require argument or cases. For all the legitimate purposes of the present case, it might therefore be conceded that the order in question is erroneous, and yet the result remain the same; but it is not erroneous, as we shall presently see, unless a previous decision of this Court is also erroneous.

The rule in Irwin *v.* Backus proceeds upon the theory—and it can be maintained upon no other—that the law of the land and the subsequent orders of the Probate Court, made within its jurisdiction, are a part of the bond of the administrator or guardian—as much so as if they were written out in terms in the body of the instrument. Hence, the contract of the

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sureties is not a mere promise to pay unliquidated damages. It is something more—it is a promise to pay whatever the Probate Court, acting within its jurisdiction, may direct their principal to pay; and according to the rule in Irwin *v.* Backus, they cannot question the terms or conditions of the order, except upon appeal directly from the order, unless it is wholly void for the want of jurisdiction. Whenever, then, the Probate Court makes an order, it immediately becomes binding upon the sureties, according to its terms, by force and effect of the peculiar terms of their contract. If the Court directs the guardian to pay a certain sum of money and he does not do it, they must pay that precise sum, not as unliquidated damages arising from the default of their principal, but as a liquidated sum which they have agreed to pay, without any *controversy as to the amount, in a cer- [125] tain event, to wit, the failure or neglect of the guardian to pay it. So, by the same conditions, the question whether the sureties can be made to pay in gold does not depend upon the fact whether that word is found in their bond when considered as something apart from the order of the Probate Court, but whether it is found in the order of the Court. They have agreed that the Court may make any lawful order which it deems proper, and that, when made, it shall become one of the conditions of their contract, and that they will perform it according to its terms if their principal does not. This is but the application of the rule in Irwin *v.* Backus to the new conditions wrought by the introduction of a second kind of money, and the power conferred upon the Courts by the Specific Contract Act to decree payment in one or the other, or generally, according to the law of the case. There is and can be no distinction between the liability of the sureties to pay the precise amount fixed by the order of the Court, and their liability to pay it in the kind of money which is specified in the order. If they can be made to pay, without controversy or cavil, the precise sum fixed by the Court, it is because they have agreed to do so. If they can be made to pay it in a particular kind of money, it is also because they have agreed to do so. If they have agreed to do the former, by parity of reason they have agreed to do the latter,

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for the latter is as much within the terms of their undertaking as the former. Neither promise is found in the bond more than the other. The germ of both is there, and when touched by the wand of the Court it assumes such form as the magician may direct.

It will be perceived that in my judgment my associates have fallen into the error of assuming the very point in controversy. They assume that the bond alone determines the question, and that, inasmuch as the kind of money is not there specified, the sureties cannot be made to pay gold. Apply the same reasoning to the other question of amount, and what is the result? There is no agreement there that they will pay the precise sum fixed by the order of the [126] Probate Court; *hence, by parity of reason, they are not bound to pay that precise sum. Yet my associates agree with me in holding that they are bound, nevertheless. So the argument proves too much. The truth of the matter is, that the bond alone does not constitute the full measure of their liability. It takes both the bond and the order to do that, which is obvious from the fact that without the order of the Court they are not bound to pay anything. Until the Probate Court has adjudged their principal liable, their liability does not take form, and then it takes precisely such form as the Probate Court may lawfully direct. So, when suit is brought, the plaintiff counts on the order of the Court, and relies upon it as the true measure of their liability. In short, the order of the Probate Court contains the whole meat of the matter, and the bond serves only as the connecting link between it and the sureties.

By way of further illustration: According to Irwin *v.* Backus, the bond in this case stands upon a level with an appeal bond. On an appeal bond the sureties undertake that their principal will pay the judgment if affirmed, or, if affirmed only as to part, then that he will pay such part. Now, suppose the judgment of the Court below requires payment in a specified kind of money, as it may lawfully do. (I am aware that in such case the Legislature, out of an abundance of caution, has provided that the appeal bond shall call for the same kind of money which is specified in the judg-

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ment; but for the present purpose I assume that no such provision of law exists, and that the appeal bond does not call for a particular kind of money.) Can there be any doubt but that the sureties could be made to pay gold in an action upon the bond, if it is averred in the complaint that the judgment was a gold judgment and that it was affirmed as a gold judgment by the appellate Court? Their agreement in legal effect is that they will pay or satisfy the precise judgment which the appellate Court renders. Now they cannot perform their promise by paying in legal tender notes, for legal tender notes will not pay or satisfy a coin judgment. Again, suppose the *bond is in keeping with the judgment and [127] calls for gold. Suppose the appellate Court determines that the plaintiff is not entitled to a gold judgment, but only a general judgment. What is the result? Do the sureties go scot free? If they have a right to stand upon the terms of their bond in the sense in which it is put by my associates, they may, for the appellate Court has not affirmed the gold part of the judgment, and therefore they are not compelled to pay gold; and as for legal tender notes, they have never agreed to pay them. This cannot be so, and hence what I claim follows. The bond alone does not determine what the contract is, in the sense in which we are now considering that question. In the case of the appeal bond, it takes the judgment of the appellate Court also to determine that question; and in the case at bar, it takes the order of the Probate Court; and in each case this result springs from the very terms and nature of the undertaking; and if suit is brought the plaintiff in the one case counts on the judgment of the appellate Court, and in the other on the order of the Probate Court, as a finality which fixes and determines, in all respects, the liability of the sureties.

That the Probate Court did not err in making the order, if that question could be considered for any purpose in connection with the present case, is shown in the case of Magraw *v.* McGlynn, 26 Cal. 420. That case was an appeal from an order of the Probate Court directing McGlynn, the executor of Broderick, to pay a claim, held by Magraw against the estate of Broderick, in gold coin, being in that respect pre-

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cisely the same order which was made in the present case. The only question was whether the Probate Court had erred in directing the claim to be paid in gold coin. A majority of this Court, after mature deliberation, (for there was a dissenting opinion showing a conflict of views between the members of the Court,) held the order valid, and near the close of a long argument said: "In this case, the money in the hands of the executor was gold coin of the United States, and the decree requires this kind of money to be paid to the creditor. This decree is in consonance with justice, [128] and, in our judgment, is *authorized by the law of the land." This language has the ring of true metal, yet the creditor in that case had not given Broderick gold, so far as the record showed. The claim was in the form of a promissory note dated at New York in 1858, where bank bills were the ordinary currency, and did not call for gold. Apply the language of the Court to this case: "In this case, the money received by the guardian was in gold coin of the United States, and the decree requires the same kind of money to be paid to his successor for the benefit of the ward. This decree is in consonance with justice, and, in our judgment, is authorized by the law of the land." To such language no right-thinking mind hesitates to add, "Amen!" for it is just and right that he who has, in a place of trust and confidence, obtained possession of the entire estate of an orphan child should be made to account to her for its full value, and not allowed to speculate upon her trust and confidence, and, under the pretence of legal right, strip her of one-third of her estate.

We have, then, an order in which there is neither want of jurisdiction nor error on the part of the Court by which it was made, for I do not understand my associates as overruling the case of Magraw *v.* McGlynn, but quite the contrary. Then this anomalous result follows: we have a joint and several cause of action against the defendants, and we have not; for, while the bond makes a joint and several liability against all the defendants, the order of the Probate Court, which is admitted to be a legal and proper order, unmakes it. But it is suggested, in the opinion of my associates, that the gold part

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of the order can be enforced against the guardian in a separate action into which the word "bond" shall not be allowed to intrude and work such anomalous results. If the order for gold can be enforced against him in any action, why not in this? The defendants have not alleged a misjoinder either of parties or causes of action, nor do I see how they could. Admitting, then, that the guardian may be made to pay gold, but the sureties cannot, why not so adjudge in this action? Is there any legal impediment in the way? None has *been suggested. Separate judgments against different [129] defendants are not wholly unknown to our jurisprudence. Besides, if we have a mongrel cause of action, why not have a mongrel judgment to match? It is a well settled principle that the judgment should follow the case, on the same line, and match it in all respects. There is certainly nothing in the way of form to prevent such a course, for we have abolished all distinctions in form, and the plaintiff now recovers upon what he says, and not upon the form in which he says it. The plaintiff now states the facts of the case precisely as they exist, to the entire exclusion of any fancy or fiction. If the ward were to bring another action against the guardian, what more could she say than is said in the present complaint? She might say less, it is true; but if as to him she has said more than is necessary, no harm is done. So, upon the theory of my associates, I am unable to perceive why the ward may not obtain full relief—and separate relief, if necessary—against the guardian and his sureties in this action. But I differ from them entirely both as to the law and the logic of the case. I think the ward is entitled, when made a party, to a gold judgment against all of the defendants.

In aid of the theory upon which the case is to be decided, reference is made to the well settled principle that sureties have a legal right to stand upon the precise terms of their contract. It is true that sureties have a legal right to stand upon the terms of their undertaking, and so, I believe, has every one else. But the claim that the sureties in this case are but asserting that right when they seek to avoid the payment of coin, is a perversion of that rule. To the unsophisticated moralist, who regards the golden rule as the aggregate

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of all law, it would seem very much like they were seeking, by their present course, to avoid the terms of their contract and to be searching for other terms, better suited to their purpose, in the Legal Tender Act. Their bond was made prior to the passage of the Legal Tender Act. At that time, coin was the only legal currency—the only kind of [130] money in *which obligations could be legally discharged and satisfied. The terms of their contract, as interpreted by the law of the land, and as understood by themselves, then meant gold, and through the beneficent operation of the Specific Contract Act the Probate Court has been vested with the power to preserve the language of their contract, and make it mean now precisely what it meant then. That act imposes no additional burden: it neither lessens nor increases the weight of the defendant's bond. What the bond was when made, it still remains, so far as that act is concerned. Let it not be said, then, that they escape the payment of coin by reason of their right to stand upon the precise terms of their bond. Let it be put upon the true ground. Let it be said that they avoid the payment of coin because they have a legal right to pay in paper money, created by the necessities of a Government struggling for existence, and not adopted because it constitutes a just medium of compensation in case of existing private contracts, made in view of a different and greater value as a measure of responsibility. The ward in this case may complain, with much reason, if not law, of the working of the Legal Tender Act, for she is thereby stripped of one-third of her estate, in fact if not in law; but the sureties have no such cause of complaint against the working of the Specific Contract Act, for that act, as was said by this Court in Lane *v.* Gluckauf, 28 Cal. 293, "but secures an honest observance of their contract, and prevents them, so far as it can be lawfully done, from availing themselves of a legal measure of public necessity to work a moral and private wrong."

The order of the Probate Court being in all respects a valid order and free from error, under the rule in Magraw *v.* McGlynn, I think it conclusive upon the sureties in all its aspects, under the rule in Irwin *v.* Backus, and that the same

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would be true were it erroneous. I am unable to perceive how it can be conclusive in part and not conclusive in whole. If it is conclusive in part, it is for the same reason conclusive in whole.

*I think the case should be remanded, with leave to [131] add the name of the ward as a party.

THOMAS W. MULFORD *v.* JUANA M. ESTUDILLO et al.[1]

JUDGMENT IN SUPREME COURT.—If the plaintiff admits on the pleadings that he never had a cause of action against the defendant, the Supreme Court will reverse a judgment in his favor, and may either order a judgment in defendant's favor in the Court below, or may remand the cause for further proceedings.

WHEN ANSWER IS CONSIDERED FILED.—If the plaintiff amends his complaint, and the defendant obtains an order to have his answer on file stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made.

OPINION OF SUPREME COURT ON APPEAL.—The presumption is, that all the facts in a record, bearing on the points decided, have received due consideration by the Supreme Court, whether all, or a part, or none of those facts are mentioned in the opinion.

LAW OF A CASE.—The decision of the Supreme Court becomes the law of the case on a second appeal, whether all, or a part, or none of the facts bearing on the points decided are mentioned in the opinion.

IDEM.—The discussion and determination, in an opinion of the Supreme Court, of other points not tending to the decision of the point upon which the appeal was disposed of, must be regarded as dicta, and not as the law of the case.

[2] ADMISSION OF FACTS ON THE RECORD.—When an ultimate fact is admitted on the record, probative facts tending to establish, modify, or overcome it, will not be considered by the Court.

JUDGMENT ON RETURN OF MANDATE OF APPELLATE COURT.—If, on an appeal, the Supreme Court of the United States simply affirm the judgment of the Circuit Court, the judgment thus affirmed becomes final, and the Circuit Court has no jurisdiction on the return of the mandate of the Supreme Court to render a new judgment.

SATISFACTION OF JUDGMENT BY LEVY OF EXECUTION.—If, on the return of a mandate from the Supreme Court of the United States to the Circuit Court, affirming the judgment of the Circuit Court, a new judgment is rendered by the Circuit Court, the issuance of an execution on the new judgment and the levy on property sufficient to satisfy it is not a satisfaction of the judgment or costs.

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[1] Same case, 17 Cal. 618; 23 Cal. 94.

[2] Cited, Hall v. Polack, 42 Cal. 225.

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IDEM.—If, on the return of a mandate from the Supreme Court affirming the judgment of a Circuit Court, a new judgment is rendered by the Circuit Court, and an execution is issued on it, and a levy is made on sufficient property to satisfy it, and the Circuit Court then sets aside the new judgment and directs the old one to be enforced, the levy is not a satisfaction of the first judgment or the costs.

SATISFACTION OF JUDGMENT.—If, after an execution has been levied on sufficient property to satisfy a judgment, the Court orders that the judgment be not enforced, the order releases the levy, and it will not have the effect of satisfying the judgment.

[132] *APPEAL from the District Court, Third Judicial District, Alameda county.

The principal facts are stated in the report of this case on the former appeal, found in 23 Cal. 94. A brief recapitulation will here be made to elucidate the points decided. Boyreau sued Campbell and others in the Circuit Court of the United States for the Northern District of California, to recover possession of a portion of the Rancho San Leandro, in the county of Alameda. The plaintiff recovered judgment, and the defendants appealed to the Supreme Court of the United States, and procured a writ of error bond signed by Bray and others as sureties. The defendants in this action executed an undertaking agreeing to indemnify the signers of the writ of error bond from and against any and all damages, by and from any judgment for costs and damages recovered, or to be recovered therein. The Supreme Court of the United States affirmed the judgment at the December term, 1858, and the mandate was filed in the Circuit Court on the 9th day of November, 1859. On the same day, on motion of the plaintiff's attorneys, a new judgment was rendered in the Circuit Court for costs, and awarding the plaintiff possession of the land. On the 30th day of November, an execution was issued on this new judgment, and on the 2d day of December the Marshal levied on sufficient of the property of James Kennedy, who was one of the defendants in the original action, to satisfy the judgment. On the 4th day of February, 1860, the Circuit Court, on motion of the defendant's attorneys, ordered that the original, and not the new, judgment be enforced. On the 21st day of February, 1860, the Marshal released the property levied on. On the 16th day of February, 1860, Bray paid the plaintiff the full

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amount of the judgment, and soon after sued Mulford, the plaintiff in this action, who was one of the principals in the writ of error bond, to recover the sum so paid. Bray recovered judgment against Mulford, on the 11th day of April, 1860, and on the 11th day of June, 1860, Mulford satisfied the judgment. Mulford, on the 27th *day of [133] June, 1860, brought this action against the persons who executed the indemnifying undertaking to recover the amount he had paid to Bray. The answer was filed April 29th, 1861; at which time the Practice Act provided that "upon the failure of the plaintiff to file a replication denying new matter set up in the answer, such new matter should be taken as true." At the June term, 1864, when the new trial took place, the clause in the Practice Act requiring a replication to be filed had been repealed. Defendants moved for judgment on the pleadings, and the Court denied the motion. Plaintiff recovered judgment, and the defendants appealed.

The other facts are stated in the opinion of the Court.

W. W. Crane, Jr., for Appellants.

The motion for judgment on the pleadings should have been granted. The answer sets up new matter which avoided defendants' legal liability, and this new matter was not denied by a replication. The plaintiff's amendment to his complaint was immaterial, and did not do away with the necessity of filing a replication. (Pr. Act, sec. 66; Whitwell *v.* Thomas, 9 Cal. 499; and Green *v.* Palmer, 15 Cal. 412.) Where a surety pays the debt of the principal, the law considers that the principal requested such payment, and he will be held liable therefor to the surety; but not so in cases where the surety was under no legal obligation to make such payment. (Kimble *v.* Cummins, 3 Met. Ky. 327.) Tested by this rule, it is clear that when Bray paid Boyreau, he was under no legal obligation to do so, and this is demonstrated by the fact that if Boyreau had then commenced an action against Bray on the writ of error bond, the latter could have defeated the action by showing the subsisting levy. Another consideration furnishes a further demonstration of the same proposition.

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Could Bray have maintained an action against Kennedy, as one of his principals, on the writ of error bond? Clearly not; because a collusive answer on the part of Kennedy would have been that his (Kennedy's) personal property was then held under the levy, and he (Bray) was under no
[134] *legal compulsion to step forward and pay the judgment. (Exall *v.* Partridge, 8 Term R. 310.)

R. R. Provines, for Respondent.

That this so-called new judgment was void, we think can admit of no doubt. (Phillips *v.* Berry, 1 Salk. 403; Eno *v.* Crooks, 6 How. Pr. 464–5.) The Circuit Court itself seems to have come to that conclusion when it entered the order of February 4th, 1860, directing that it be not enforced. The late Supreme Court seems to have regarded this new judgment as not void, although it is conceded that it "may have been erroneous or irregular." It really matters very little as regards the case at bar, whether that judgment was void or merely erroneous or irregular, since it had been entirely abrogated and annulled by the Court in which it was supposed to have been entered. The motion for judgment for defendants on the pleadings was properly denied. It was made after the complaint had been amended, and after the entry of the order, made on defendants' motion, allowing the answer to the original complaint to stand as the answer to the complaint as amended. There was thus clearly made up an issue as to whether the original judgment in Boyreau *v.* Cambpell et al. was paid, satisfied, or otherwise discharged. The motion was, therefore, and for other reasons, properly denied. If the averment added to the complaint by way of amendment was immaterial, as claimed by counsel, then that portion of the answer which traverses that allegation and the issue thus presented must also have been immaterial, and if judgment upon the pleadings should have been given at all, it should have been in favor of the plaintiff.

Mr. Crane, in reply.

The counsel for respondent claims that the judgment of November 9th, 1859, was absolutely void. It is sufficient to

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say that this point has been disposed of in the opinion on the former appeal, 23 Cal. 101. The Court there say: "The judgment on which the execution issued may have been *erroneous or irregular, but it was not void, so [135] as to render the execution invalid. The Court in which it was rendered had jurisdiction of the parties and of the subject-matter, and that was sufficient to make it valid, so far, at least, that it could not be inquired into in this collateral action."

By the Court, RHODES, J.:

The first inquiry is, what was determined by this Court on the last appeal in this case? The case is reported in 23 Cal. 94. The plaintiff alleged in his complaint, that while the case of Boyreau v. Campbell was pending in the Supreme Court of the United States, the defendants executed to the plaintiff and others the instrument in suit—which the parties call a bond of indemnity—by which the makers of the bond agreed to indemnify the obligees and their sureties upon the writ of error bond against all damages and costs recovered or to be recovered in the case of Boyreau v. Campbell; that the judgment in that case was affirmed by the Supreme Court and remanded to the Circuit Court for execution; that Bray, one of the sureties upon the writ of error bond, paid the judgment for costs, execution therefor having been issued, and afterwards recovered judgment for the same against the plaintiff, and that the plaintiff paid the latter judgment. The defendants in their answer, after denying several of the allegations of the complaint, set up as a defence that before the payment by Bray, the execution had been levied upon sufficient property of Kennedy, a defendant in that case, but not a party to the indemnity bond, to satisfy the execution, and that the property was in the custody of the Marshal at the time Bray made his payment.

On appeal, the defendants contended that the above defence was a complete answer to the action, by way of confession and avoidance, that the matter of avoidance constituted new matter within the meaning of the Practice Act, and that as the plaintiff had not replied to it—as was then required by

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the act—it stood as admitted on the record. The [136] Court held *with the defendants, that the facts set forth in the answer constituted new matter, and were to be taken as true, because the plaintiff failed to reply to them. The decision of that point virtually ended the cause on appeal; for if the plaintiff admits on the pleadings facts showing that he never had a cause of action against the defendants on the bond of indemnity, the judgment in his favor must of necessity be reversed. The Court might thereupon have ordered judgment for the defendants; or, if in their opinion the circumstances of the case required it, have remanded the cause for further proceedings. The Court pursued the latter course, and both parties agree that the cause was remanded for a new trial.

Upon the return of the cause to the District Court, the plaintiff obtained leave to amend the complaint, and it was accordingly amended; and upon motion of defendants their answer on file was allowed to stand as their answer to the amended complaint. The answer is to be treated as if it had been then filed, and at that time no replication was required by the Practice Act. The amendment amounted to this: that the judgment of the Circuit Court was not paid, satisfied, or otherwise discharged, when Bray, a surety upon the writ of error bond, paid to the judgment plaintiff the amount of the judgment. That averment is material; for if the judgment did not in fact then remain unpaid and unsatisfied, no cause of action accrued to Bray because of his having made the payment. The answer having been in effect filed as the answer to the amended complaint, and no replication thereto being required, the new matter therein contained was deemed to be controverted by the plaintiff, and the burden of proof was cast on the defendants.

At the new trial, the District Court found, among other things, that Bray, on the 16th day of February, 1860, paid Boyreau one thousand six hundred and thirty-four dollars and sixty cents, "in discharge of the judgment in said case of Boyreau *v.* Campbell and others, for and upon which execution issued on the 15th day of February, 1860, and in payment of said writ of error bond, as such surety;" and second,

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"that *said judgment for costs was not paid, satisfied, [137] or otherwise discharged by any other person than the said John G. Bray." There is no disagreement between the parties as to the facts of the case which we regard as material, except as to whether the judgment for costs was unsatisfied at the time the payment was made by Bray.

The defendants, in their motion for a new trial, do not specify that the evidence was insufficient to justify the second finding; but they state as one of the grounds, that "there is no evidence that the defendants directed or consented to the discharge of the levy in said action upon the personal property of James Kennedy." No such fact was actually found, and we could not say from the record that it was presumptively found. The object of this specification, however, is very manifest, and that is to present the point that the second finding is in conflict with the decision on the former appeal.

Neither party is willing to accept that portion of the opinion following the decision of the point on which the former appeal turned, as constituting the law of the case. The defendants contend that the Court misapprehended the facts in the record, and that the reasoning of the Court in respect to the revival of the liability of the sureties upon the writ of error bond, by a discharge of the levy, is fallacious. The plaintiff, on the other hand, would avoid the whole opinion of the Court so far as it respects the levy upon the property of Kennedy, and the consequent satisfaction of the judgment, on the ground that the Court omitted to notice, that the judgment upon which the execution in question issued was set aside by the Circuit Court before Bray made his payment. But neither position is tenable. If the opinion in respect to the levy of the execution is the law of the case, it must be accepted with all the qualifications therein stated; and on the other hand the circumstance that a material fact appearing in the record is not recited among other facts which are stated in the opinion, does not tend to show that such fact was not considered by the Court, and its due value assigned to it. *The presumption is the same, whether all, or a [138] part or none of the facts are mentioned in the opinion,

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and that is, that all the facts in the record, bearing on the points decided, have received due consideration.

The question presented by the defendants must be solved upon considerations lying back of those urged by either party. If our views as to what was decided by the Court are correct, (and we feel no doubt in the matter,) then the discussion and determination of other points not tending to the decision of the point upon which the appeal was disposed of, must be regarded as dicta, and not as the law of the case. The answer was in terms almost as general as those in which we have stated its substance. No allusion is therein made to a second judgment of the Circuit Court, or to an execution issued upon such judgment, or to a release, by any means, of the levy made under the execution. The defence, when held to be new matter requiring a replication, and which, for the want of a replication, was deemed to be admitted by the plaintiff, constituted a complete bar to the action; and the discussion of the weight and effect of evidence which would have been admissible, had the plaintiff taken issue upon the new matter in the answer, is mere speculation. Where the ultimate fact is admitted on the record, probative facts tending to establish, modify, or overcome it, are not the proper subjects of judicial action; and we must therefore hold that the opinion of the Court in respect to the second judgment of the Circuit Court, the execution, its levy, and subsequent release, does not constitute the law of the case, and must be regarded as dicta. The questions arising upon those matters are open to investigation in this case, and we will proceed to their consideration so far as may be necessary for the disposition of the appeal.

At the last trial, the defendants, in order to sustain on their part the issue upon the new matter contained in their answer, introduced in evidence the mandate of the Supreme Court of the United States affirming the judgment of the Circuit Court; the judgment rendered by the Circuit Court on the filing of the mandate; the execution issued
[139] upon that judgment, and *the Marshal's return showing a levy upon the property of Kennedy; and an order made by the Circuit Court on the 4th day of February, 1860.

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The judgment rendered by the Circuit Court on the return of the new mandate was in our opinion simply void. The judgment of the Supreme Court affirming the judgment of the Circuit Court made the judgment affirmed conclusive, and in the highest sense final. The Circuit Court doubtless might have or acquire jurisdiction of the parties to enforce the judgment as affirmed, if its aid was invoked for that purpose; but it was as utterly destitute of authority to render judgment in the cause after the return of the mandate, as it was during the pendency of the cause in the Supreme Court. If it can be maintained that the judgment was merely erroneous, the same would be true of a third or any further judgment, and thus there might be an indefinite number of judgments between the same parties for the same cause of action, all of which might be enforced unless reversed by the appellate Court. The judgment being void, the execution was also void.

But conceding the judgment to have been merely erroneous, it was virtually set aside by the order entered on the 4th of February, 1860. The Court ordered that "the original judgment in this cause be enforced, and not the new judgment filed herein." The direction that it be not enforced in effect destroys it for all purposes, and a necessary consequence of the order is, that process issued for the enforcement of the judgment falls with the judgment, and property levied on and then held by the Marshal for the satisfaction of the execution, is released from the execution. If it is considered that the levy while it subsisted operated as a satisfaction or a *quasi* satisfaction of the judgment—the true judgment in the cause—it ceased to have that effect when the levy was discharged by the operation of the order. The order, it will be noticed, was entered several days anterior to the time when Bray made his payment; and so the judgment was unsatisfied at the time Bray paid the judgment for costs, as was found by the Court below.

Judgment affirmed.

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[140] *THE PEOPLE *v.* A. J. McGUIRE.

CREATING NEW COUNTY.—When a law is passed providing for the creation of a new county out of parts of counties already existing, which act provides for the future election of county officers, and fixes a time after their election when they shall enter upon the discharge of their duties, the territory described does not become a county until its organization is perfected by the election of its officers.

IDEM.—To constitute a county something more is required than a law defining its boundaries. A local government must be provided.

JURISDICTION OF COUNTY COURTS TO FIND INDICTMENTS.—If a new county is created out of a part of the territory of an old one, with its organization to be effected at a future time, the County Court of the old county has jurisdiction to find indictments for crimes committed in the territory of the new county, between the time of the passage of the law and the organization of the new county.

JURISDICTION OF DISTRICT COURTS AS TO TRIALS FOR CRIMES.—If the act creating a new county out of a part of the territory of an old one, transfers the new county to a different judicial district from the old one, the District Court of the new county has jurisdiction to try all indictments for murder found in the County Court of the old county, but committed in the new county after the passage of the act, provided the trial is not had until the new county is organized.

The defendant appealed.

The other facts are stated in the opinion of the Court.

Quint & Hardy, for Appellant.

For all judicial purposes the county of Kern was fully created on the 2d day of April, 1866; said county forming a part of the Sixteenth Judicial District. The Governor is required immediately after the passage of the act, to appoint a Judge of the Sixteenth Judicial District. Kern county is a recognized county in this district, and the act takes effect upon its passage. The act was committed in territory assigned to the Sixteenth District. The Thirteenth District had no jurisdiction over the offence.

Attorney-General, for the People.

By the Court, SANDERSON, J.:

The defendant was indicted in the County Court of the county of Tulare for the crime of murder. He was tried and convicted of the crime of murder in the first degree
[141] in the *District Court of the Thirteenth Judicial District, sitting in and for the county of Tulare.

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After verdict, he moved in arrest of judgment upon the grounds: First, That the County Court of the county of Tulare had no jurisdiction of the alleged offence for the purposes of indictment; and second, That the District Court of the Thirteenth Judicial District, sitting for the county of Tulare, had no jurisdiction of the indictment for the purposes of the trial.

This motion was denied.

The defendant then moved for a new trial upon the ground that certain errors of law were committed during the progress of the trial.

This motion was also denied.

We shall find occasion to review the former motion only. The grounds of the motion in arrest of judgment are substantially as follows: On the 2d day of April, 1866, the Legislature passed "An Act to create the County of Kern, to define its boundaries, and to provide for its organization." (Stat. 1866, p. 796.) This act contains no provision as to the time when it shall take effect, and therefore, under the general statute in relation to that subject, it took effect sixty days after its passage, to wit, on the 1st day of June, 1866. It creates the county of Kern out of territory which belonged in part to the county of Tulare and in part to the county of Los Angeles. For the purpose of organizing the county, it directs that immediately after the act shall be in force the Governor shall appoint some suitable person as County Judge, (sec. 7,) and that the other county officers shall be elected at an election to be held on the second Thursday in July, 1866, which was the twelfth day of the month. (Sec. 4.) It creates a Board of Commissioners, who are empowered and required to establish precincts and appoint officers of election, and to canvass the election returns and declare the result, and to commission those who have been elected. (Secs. 5 and 6.) For the purpose of canvassing the returns the Board are required to convene on the tenth day after the election. (Sec. *6.) Within ten days after receiving their cer- [142] tificates of election the officers are required to qualify before the County Judge, and thereupon enter upon the discharge of their respective duties. (Sec. 8.) For the pur-

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poses of representation in the Assembly the county is attached to the county of Tulare, and for the purposes of representation in the Senate, to the Fourth Senatorial District. For judicial purposes it is attached to and made a part of the Thirteenth Judicial District. (Sec. 11.)

On the same day, to wit, the 2d of April, 1866, another act was passed "to create the Sixteenth Judicial District." (Stat. 1865–66, p. 863.) Although approved on the same day this act was framed, and introduced in the Legislature subsequent to the act to create Kern county, which is apparent from the fact that it treats of Kern county as already established, it provides that the counties of Alpine, Mono, Inyo, and Kern shall compose the Sixteenth Judicial District. (Sec. 1.) That suits brought and matters pending in the District Courts for those counties shall be heard and determined in the District Court for the Sixteenth Judicial District. (Sec. 2.) That a District Judge shall be appointed and commissioned by the Governor immediately after the passage of the act. (Sec. 5.) That the terms of the Court shall commence on the first Mondays of June and December of each year. (Sec. 3.) And lastly, that the act shall take effect from and after its passage. (Sec. 8.)

The offence is charged in the indictment as having been committed on the 16th of May, 1866, at the county of Tulare. The record shows that it was committed at the town of Havilah, which was in Tulare county prior to the creation of Kern county, but is now the county seat of the latter county. The indictment was found on the 6th of July, 1866, and, by order of the County Court, transmitted on that day to the District Court of the Thirteenth Judicial District for the county of Tulare, where it was subsequently tried at the October term, 1866.

The first question is, when did Kern become a [143] county? *We answer, when its organization was perfected, on or about the 1st of August, 1866, and not before. It did not become a county on the 2d of April, because the act was not to take effect until sixty days thereafter, to wit: the 1st of June. It did not become a county at the latter date, because the whole tenor and scope of the act

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shows that the Legislature could not have intended that the territory included in the boundaries described in the statute should become a county until organized by the election and qualification of such officers as are required to administer the county government. The first section, which creates the county, does not speak in the present tense but in the future. The language is, "there shall be formed," etc. Thereafter, the act proceeds and directs how the county is to be formed. So far as defining its boundaries are concerned, the act itself forms the county, but so far as its organization is concerned, it merely directs how it shall be accomplished. To constitute a county, something more is required than to define its boundaries. A local government must be provided, and the creation of the county is not accomplished until both these things have been done in the appointed mode. To hold otherwise, would lead to very absurd consequences. It would place the people and property within the territory of the proposed county wholly without the pale of the Government, and erect a place where, in the forcible language of the Attorney-General, "there would be neither civil nor criminal law; where crime would go unpunished, and criminals hold high carnival." The Legislature could not have intended such consequences, and there is nothing in the statute which stands in the way of a different and more rational conclusion. (21 Cal. 415.)

The next question is, when organized, of which Judicial District did Kern county become a part—the Thirteenth or the Sixteenth? We answer, the latter. Although both acts were approved on the same day, yet it is clear that the act creating the Sixteenth Judicial District contains the latest will of the Legislature; besides, the assignment of Kern county to a particular Judicial District was not the main purpose of *the act creating the county, but an [144] incident which ordinarily would be provided for in the act dividing the State into Judicial Districts, and under the present circumstances, in the act creating the Sixteenth Judicial District. The former act is specially and mainly devoted to the creation of the county, and the latter with the creation of the district. Where such is the case each act

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must furnish the rule applicable to its main purpose, because it must be presumed that the attention of the Legislature was therein more especially called to that branch of the general subject. (Dobbins *v.* The Board of Supervisors of Yuba County, 5 Cal. 414.)

From what has been said thus far, it follows that there was no county of Kern at the time this offence was committed, nor at the time the indictment was found, and hence the County Court of Tulare had jurisdiction of the case for all the purposes of indictment. Before the defendant was tried, however, Kern county had been organized and become in all respects a separate jurisdiction, and in our judgment the jurisdiction of the District Court of the Thirteenth Judicial District for Tulare county over this case then ceased and determined, and that Court ought to have transmitted the case to the District Court of the Sixteenth Judicial District for Kern county, pursuant to the provisions of the second section of the act creating that district. The case may not come directly within the letter of that section, for it cannot be said, strictly speaking, that the case was pending in the District Court of Kern county at the time that act was passed, but it would have been, had that county, as assumed by the Legislature, been then organized, and comes, we think, within the true intent and meaning of the Legislature.

The judgment is reversed, and the Court below directed to transmit the case to the District Court of the Sixteenth Judicial District for the county of Kern for trial.

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[145] *MENDOCINO COUNTY *v.* JOHN W. MORRIS et als.

COMPLAINT ON OFFICIAL BOND.—If the complaint on an official bond in a suit against the principal and his sureties avers the execution of the same by both principal and sureties, and a copy of the bond is annexed to the complaint which does not contain the signature of the principal, the complaint is good unless demurred to specially for being ambiguous in this respect.

EXECUTION OF OFFICIAL BOND.—If the complaint on an official bond avers the due execution of the same by both principal and sureties, and the answer takes

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issue on the averment, and verdict and judgment are for plaintiff, the judgment will not be disturbed on appeal upon the judgment roll on the ground that what purports to be a copy of the bond annexed to the complaint does not contain the signature of the principal.

PLAINTIFF IN SUIT ON OFFICIAL BOND.—If the complaint on the official bond of a County Treasurer avers that the money for which the Treasurer is in default belongs to the county, the action is properly brought in the name of the county.

APPROVAL OF OFFICIAL BOND.—The official bond of a County Treasurer is not invalidated because approved by the County Judge instead of the Board of Supervisors.

BREACH OF OFFICIAL BOND.—An averment in a complaint on a County Treasurer's official bond that he received money belonging to the county and retains it, and refuses to deliver it to his successor in office, is a sufficient averment of a breach of its conditions.

JUDGMENT ON BOND.—In an action against the principal and his sureties on an official bond, if the bond contains no promise to pay in coin, judgment can only be rendered payable in money generally. This rule applies to the principal as well as sureties.

TRANSCRIPT ON APPEAL.—A copy of the minutes of the Court, as kept by the Clerk during the progress of the trial, should not be inserted in a transcript on appeal.

APPEAL from the District Court, Seventh Judicial District, Mendocino county.

The bond sued on was joint and several. The plaintiff averred in the complaint that John W. Morris was Treasurer of Mendocino county from the 7th day of March, 1864, until the 5th day of March, 1866, and that he received as Treasurer, for the use and benefit of the county, in gold coin, fifteen thousand dollars, which was the property of the county, which sum he had unlawfully in his possession, and that he had refused to deliver it to his successor in office, although he had often been requested to do so. Plaintiff had judgment against *both principal and sureties, payable in gold [146] coin. Defendants appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The bond set out in the complaint, while signed by the sureties, was not signed by the principal, John W. Morris, and is, therefore, void. No difference can be detected between the bond in this case and the one subject to review by this Court in the case of The People *v.* Hartley, 21 Cal. 585,

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wherein Mr. Chief Justice Field said: "Being a joint bond, the signature of the principal was essential to its validity and binding force upon the sureties. As we said of the law in the case of Sacramento v. Dunlap, 14 Cal. 423, so we may say of this. The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this." (17 Mass. 591; 2 Pick. 24; 4 Watts, 21; 11 Vt. 447; 9 Tex. 1; People v. Breyfogle, 17 Cal. 509.) It was approved by the County Judge, who had no jurisdiction. (People v. Evans, 29 Cal. 429.) This, unaided, is a vital defect. (Sections 2, 3, and 4, act of July 28th, 1850; Hit. Dig. 445.) Section eleven of the same act provides that such defects may be cured—by suggestions of the same in the complaint—which was not done in this cause, and therefore the bond is void. (6 Cal. 639; 9 Cal. 286; 21 Cal. 585.)

Attorney-General, for the Respondent.

Appellants cannot raise for the first time in this Court the objection that the bond was not signed by the principal, J. W. Morris. The complaint says that it was, and if it had been denied, it was a question of fact to be determined by the evidence. It was not necessary for the complaint or copy of the bond attached thereto to set out any of the names subscribed, but simply to set forth the body of the instrument, and allege (as it does) that J. W. Morris made, [147] executed, and *delivered it. For aught this Court may know, the original is subscribed by Morris, and his name omitted in the copy through mistake. (10 Cal. 347.) A very clear and apparent difference can be detected between this bond and the one in the case of The People v. Hartley, 21 Cal. 585. The words "jointly and severally firmly by these presents" are contained in this bond, and were omitted in the other. These words create a *joint and several* liability. (People v. Love, 25 Cal. 530; People v. Evans, 29 Cal. 429.) In the case of The People v. Edwards, 9 Cal. 292, this Court said: "The defect in the approval of the bond could not avail the defendants. The object of requiring the approval is to insure greater security to the public, and it does not lie in

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the defendants to object that their bond was accepted without proper examination into its sufficiency by the officers of the law." (9 Cal. 292; 17 Id. 503, 509; 13 Id. 502; People v. Evans, 29 Id. 429.)

By the Court, SAWYER, J.:

This action is against the principal and his sureties on the official bond of the County Treasurer of Mendocino county. The appeal is from the judgment, and there being no statement or bill of exceptions, the only questions presented arise on the judgment roll. There was no error in overruling the demurrer to the complaint. A copy of the bond purports to be annexed to the complaint as Schedule A. Said copy does not contain the signature of Morris, the principal. It is claimed that there is no cause of action shown against Morris for the want of his signature, and that, for the same reason, the bond is void as to the sureties. It is unnecessary, however, to determine the effect of the failure of the principal to execute the bond. The complaint distinctly avers the execution of the bond by all the defendants. The defendants, in their answer, have taken issue upon the averments, and the verdict is in favor of the plaintiff on the issues. It must be presumed that the omission of the name of the principal in the copy appended to the complaint is a clerical error. Upon *the demurrer, in the form adopted in this case, [148] the direct averment of the execution of the bond in the body of the complaint must prevail, as against the omission of the signature in the copy appended. It may be that there is a want of correspondence between the averment in the body of the complaint and the copy annexed, but if so, the most that can be said is, that the complaint is ambiguous in this respect, and this objection was not specified as a ground of the demurrer under any head. The grounds of the demurrer relied on were all particularly specified, and this is not one of them. The objection is raised for the first time in this Court. The demurrer is not general, that the complaint does not state facts sufficient to constitute a cause of action in certain specified particulars. There was a good averment of the execution of the bond in the body of the

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complaint, and no objection appears to have been taken in the Court below on the ground of want of correspondence between the bond set out and the averment, and we think the complaint good, at least after verdict. Had the objection been taken in the Court below, the clerical omission of the signature of the principal in the copy, if it be one, might have been corrected.

The facts set forth, we think, show a breach of the condition of the bond and a cause of action. The moneys for which the Treasurer is in default are alleged to belong to the county of Mendocino, and the action is properly brought in the name of the county. The fact that the bond was approved by the County Judge, instead of the Board of Supervisors, is no defence to the action. The liability of the sureties does not depend upon the approval of the bond by the proper officers. (People *v.* Edwards, 9 Cal. 286; People *v.* Evans, 29 Id. 436.) Besides, although the bond appears to have been approved by the County Judge, there is nothing in the record to show that it was not also approved by the Board of Supervisors. No question of this kind appears to have been raised in the Court below.

The action is on the bond for damages resulting
[149] from a *breach of its conditions. The bond contains no covenant to pay in coin. The judgment for coin, as to the sureties, is erroneous for reasons stated in the case of Fox *v.* Minor, ante 111.

It may be that a judgment for coin could be recovered against the principal in a proper suit for the moneys received by him in his fiduciary capacity; but this is not an action of that kind. Morris is sued with his sureties as one of the obligors on the bond only. The bond alone is the basis on which the action rests; and, in a suit upon the bond, all the parties stand upon the same footing, and are entitled to rest on the terms of the undertaking. The only recovery that can be had on the bond is the damages resulting from the failure of Morris to discharge his duties in the mode prescribed by law; and the damages can only be required to be paid in money generally, according to the terms of the bond. We observe that, in some cases brought before us, the officers

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approving official bonds have required them to be made payable in coin. This practice seems to be a safe precaution.

All that portion of the transcript after folio sixty-nine, except the notice of appeal, was improperly inserted. It constitutes no part of the record on this appeal.

The judgment of the District Court is modified by striking out all those portions directing payment to be made in coin, and costs are awarded to appellant, except as to that portion of the transcript improperly inserted, as indicated in this opinion.

SANDERSON, J., dissenting.

There is but one point in this case upon which I desire to express an opinion. The point involves the question whether the plaintiff is entitled to a judgment payable in coin only. A majority of my associates are of the opinion that the plaintiff is not entitled to insist upon payment in coin, and the reason given is substantially the same as that given for a like conclusion in Fox *v.* Minor, ante 111. My reasons *for dissenting in this case, so far as the principal on [150] the bond is concerned, are the same in part as those given by me in the case of Fox *v.* Minor; but so far as the sureties are concerned, they rest upon a different, though cognate foundation. In the opinion delivered by Mr. Justice SAWYER, the Specific Contract Act is assumed to be the only test of the question. In my judgment that act is a sufficient test so far as the principal on the bond is concerned, but has no immediate bearing upon the question as against the sureties; nor do I find any occasion for going to the provisions of that act to find a rule applicable to the principal, for in my judgment there are other grounds, upon which both principal and sureties can be held liable to pay coin, and which are therefore common to both.

But first, assuming that the Specific Contract Act is the sole test, and that under its provisions the principal can be made to pay coin but his sureties cannot, I hold that he can be made to do so in this action as well as in any other, and I so hold for the reasons which are stated in my opinion in Fox *v.* Minor. The idea that in this State and under our system

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of practice, which recognizes no distinction between the forms of actions, certain relief can be obtained by the same party against the same party in one action and not in another, based upon substantially the same state of facts, is new to me. If a plaintiff recovers under our system it is because of the facts which are stated in his complaint and not by reason of the form in which they are stated. As against the principal on the bond in suit, no facts can be stated in another action which are not stated in this, and if the plaintiff is entitled to recover gold at all, or, in any event, it is so entitled upon the facts stated in the present case. This seems to me to be too obvious for argument. If, as my associates hold, the plaintiff is entitled to recover gold as to the principal, but not as to the sureties, there is no difficulty in so adjudging in the present case, and so disposing of the whole matter in one suit. Under our system there is no legal impediment in the way of granting different measures of relief against different de-
[151] fendants if, *under the law, such is the right of the plaintiff, in the same action. If there is, it does not occur to me, nor has it been suggested by my associates, either in this case, or in the case of Fox v. Minor. The only difficulty hinted at lies in the circumstance that this is an action on the official bond of the party in question, and that in order to recover gold an action would have to be brought on something else. The supposed difficulty, if it has any foundation, either in law or reason, which, as I conceive, it has not, rests upon the idea that where there is a written contract there can be no recovery for gold upon it, under the Specific Contract Act, unless it contains a covenant to pay gold. This idea finds no countenance in the provisions of that act. Under that act, the plaintiff is entitled to recover upon either of two different conditions being found—first, a promise in writing by the defendant to pay gold; and second, a fiduciary relation between the plaintiff and the defendant, followed by a receipt of gold by the defendant while occupying that relation. In the former case, the plaintiff must show a promise in writing, but in the latter he need not. If, in the latter case, there happens to be a written contract between the parties—and there is quite as likely to be one as not—it

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makes no difference whether it calls for gold or not, for the law steps in and says that the plaintiff is entitled to gold upon the sole ground that the defendant received the money in a fiduciary capacity, and the money so received was gold. If there happens to be a written contract, and it happens to call for gold, the plaintiff is entitled to recover gold upon both grounds; but if it does not happen to call for gold, then he is still entitled to recover gold, but only upon the latter ground, and in either case the action is upon the written contract as the foundation of the plaintiff's right to recover. So, were the principal in this case sued alone, and sued squarely upon his bond, the plaintiff would be entitled to recover gold upon alleging that the defendant occupied a fiduciary relation and received the money of the plaintiff in gold coin, notwithstanding the bond is silent upon that subject. Hence, as I have already said, the idea upon which it is *assumed that the plaintiff cannot recover a gold judg- [152] ment against the principal in this action (because it is upon the bond and the bond does not call for gold) finds no countenance in the Specific Contract Act or anywhere else, so far as my observation goes, except in the leading opinions in this case and in the case of Fox v. Minor. Where the parties to a contract, which bears interest, fail to insert a rate of interest in their contract, the law steps in and determines the rate of interest for them. So in the case of a written contract in which the parties have failed to specify the kind of money in which payment is to be made, the law steps in and determines the question by first ascertaining whether a fiduciary relation exists between them, and if it does, gold is awarded.

Under the rule adopted by my associates in this case the door to the most stupendous frauds is opened, and those who have the collection, custody, and disbursement of the public funds, and the sureties upon their official bonds, are invited to enter and divide the spoils. Under it those persons, as contradictory as it may seem, may lawfully do what the law has expressly prohibited under penalty of fine and imprisonment. Under it the Treasurer of State may, upon the expiration of his term of office, or at any other time, pocket the hundreds of thousands in his vaults, paid by the people

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of the State in gold coin, as required by law, for the support of the Government, and quietly wait to be sued upon his official bond for its recovery, and when judgment is rendered against him, legally satisfy the same in full with the same number of dollars in legal tender notes, making by the transaction a clear profit of a quarter or a half million in gold, according as the Treasury is more or less plethoric. The same is true of every other officer throughout the State who has anything to do with the collection or custody of public moneys. It is true that the law provides that any officer who may change in any way or use in any manner the public funds in his custody, other than as provided by law, shall be deemed guilty of a misdemeanor, and punished by fine and imprisonment. But if he may lawfully do what this Court [153] holds he may in this *case, how can it be said that in so doing he has acted unlawfully? He does nothing secretly, but acts openly and claims to be doing nothing to the legal wrong and injury of the State; on the contrary, he is willing to pay the State all that she can legally claim at his hands, and is willing, if she desires, to go into Court at once and confess judgment for that amount and then pay it on the spot. In legal tender notes, it is true; but if the State has no right to claim anything else, what right has she to punish him when he has done all that he can be legally required to do? It certainly cannot be possible for the same Court to say to him to-day in one action before it "what you propose to do is strictly legal," and to-morrow, in another action involving the same subject-matter, "what you proposed to do yesterday and have done in the meantime is in violation of the law against crime, and you must therefore be fined and imprisoned." The same act cannot be lawful and criminal at the same time.

Where consequences so absurd follow, it is certainly safe and judicious to look a little further into the matter and see whether the law is really as represented. If it is, the Courts are not responsible for the consequences, however absurd they may be.

It is proper for me to say at the outset that I do not claim that the sureties in this case are affected by the Specific Con-

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tract Act, or that the plaintiff is entitled to a judgment in express terms payable in coin, though I see no sufficient reason for not inserting those terms in the judgment. While I claim that the principal is bound by the Specific Contract Act, the same as in the case of Fox *v.* Minor, ante 111, I admit that the sureties are not, for they have neither agreed to pay gold, nor have they received the money in a fiduciary capacity, or in any other capacity. The bond in this case does not belong to the same class as the bond in Irwin *v.* Backus, 25 Cal. 214. or in Fox *v.* Minor, and is not therefore within the rule announced in the former case and contended for by me in the latter. What I do claim, however, is that under the laws of this State, as *heretofore inter- [154] preted by this Court, the liability of the sureties is unaffected by the Legal Tender Act of Congress, and that the judgment against them, whether in terms a gold judgment or not, cannot be legally paid or satisfied by the tender of legal tender notes.

I do not propose to open the question whether the legislation of this State, to which I am about to refer, is or is not repugnant to the Legal Tender Act, and if so therefore unconstitutional, or whether this Court erred in deciding as it did in the cases to which I am about to refer. All that I propose to do is to show that under the laws of this State, as interpreted in the former decisions of this Court, the defendants in this case cannot discharge the claim of the plaintiff by the payment of legal tender notes, but can only do so by the payment of coin of the United States.

The General Revenue Act, passed on the 17th of May, 1861, (Stat. 419, sec. 2,) provides that all taxes for State or county purposes "shall be paid in the legal coin of the United States, or in foreign coin at the value fixed by the laws of the United States," with a proviso that county taxes levied in accordance with any special act may be collected in such funds as the special act may designate.

"An Act concerning the State Revenue," passed on the 4th of April, 1864, (Stat. 1863–4, p. 364,) provides that "all taxes upon real or personal estate, all poll or other taxes, and all licenses levied, in whole or in part, for the use and benefit

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of the State, shall be collected and paid into the State Treasury exclusively in the gold and silver coin of the United States, * * * and all dues to the public treasury of the State, or of any county or city, shall be payable and be paid exclusively in the gold and silver coin of the United States."

This provision of the act of the 17th of May, 1861, came before this Court in the case of Perry v. Washburn, 20 Cal. 318. The case was an application for a mandamus to compel the defendant, who was Tax Collector of the city and county of San Francisco, to receive from the relator legal tender notes in payment of his taxes, which the defendant [155] claimed were *payable only in United States gold and silver coin, or foreign coin at the value fixed by the laws of the United States. The mandamus was denied, the Court holding that legal tender notes were not legal tender in the payment of State and county taxes. The ground of the decision was that a tax was not a debt within the meaning of the Legal Tender Act, and that by the use of the terms, "debts, public and private," Congress only intended such obligations for the payment of money as are founded upon contract.

The act of the 4th of April, 1864, came before this Court in Ex parte Whipple, on habeas corpus, at the January term, 1866. The case has not been reported. Whipple had been convicted of a violation of the law against gaming, and fined in the sum of one thousand dollars, and ordered to be imprisoned until the fine was paid at the rate of two dollars per day. He had tendered in payment of his fine the requisite sum in United States treasury notes which had been refused on the ground that the fine was a public "due" within the meaning of the act of the 4th of April, 1864, and therefore could be paid only in gold and silver coin of the United States. Thereupon he sued out a writ of habeas corpus and came before this Court claiming to be entitled to be discharged from custody by reason of the premises. The Court denied his petition and remanded him, holding that United States treasury notes were not a legal tender in payment of the fine. The opinion of the Court was delivered by Mr. Justice SAWYER, who, among other things, said: "We also think the fine in

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question in this case was required by the act of the 4th of April, 1864, to be paid exclusively in the gold and silver coin of the United States." So this Court held that the fine was a "due to the public treasury," in the language of that act, and therefore payable only in United States gold and silver coin.

It is obvious from the statutes to which I have referred, that it is and has been the clear intent of the Legislature of this State to save its finances of all kinds from the operation of the Legal Tender Act of the Federal Government, and to *allow nothing in the form of money, except [156] gold and silver coin of the United States, to find its way into the Treasury of the State, or into the Treasury of any county or city. But, as if to leave no room for doubt or argument on that head, it has been expressly provided, in addition to requiring all taxes and public dues of every kind to be paid in coin, that any officer having to do with the public moneys who shall change the same into a different kind of money shall be deemed guilty of a felony, and on conviction thereof shall be punished by fine or imprisonment. (Stat. 1863, p. 97, secs. 3, 4.) This legislation necessarily, if constitutional, has the effect to completely nullify the congressional legislation upon the subject of legal tender, so far as the payment of taxes and other public dues are concerned; or, which amounts to the same thing, to withdraw all questions touching, or in any way affecting State, county, and city funds from the operation of the Legal Tender Act. The result has been, and is the same, as if the Legislature had provided in express terms that "United States treasury notes shall not be a legal tender for the payment of taxes upon real or personal estate, poll or other taxes, or licenses, levied in whole or in part for the use and benefit of the State; or for the payment of any dues, of any kind whatever, to the public treasury of the State, or of any county or city; but gold and silver coin of the United States shall be and remain the only legal tender for the payment of the same, notwithstanding any law of Congress to the contrary." Such being the case, no argument is required to show that the money sued for in this case is a "due" to the public treasury of the county of Mendocino, and

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therefore within the rule requiring payment to be made in gold and silver coin of the United States, whether the judgment be entered, in terms, for coin or not; and, in my view, this conclusion is fully sustained by the decisions of this Court to which I have referred. If a judgment, in a criminal action, that the defendant do pay to the people of the State of California a certain sum of money, by way of punishment for his offence, is a "due," as was held in Ex parte
[157] Whipple, then, by parity of reason, a *judgment in this case that the defendants do pay to the county of Mendocino the sum therein specified, on account of public money converted to his own use by a defaulting Treasurer, is also a "due" to the public treasury of the plaintiff, and can be satisfied only, as Whipple was made to satisfy his fine, by payment in gold and silver coin of the United States.

That the two cases to which I have referred are sound, I have no doubt. There might be much said in addition to what has been said in those cases, and other cases, involving questions of currency decided by this Court in support of the validity of the legislation of this State and of the soundness of the doctrine announced in those cases, and for which I am now contending; but the question does not possess the interest which it once did, and I forbear further discussion. It is sufficient to say that where there are two or more kinds of money, either of which is equally lawful and a legal tender for the payment of debts or the discharge of legal claims of any kind, it cannot, in the nature of things, be unlawful for individuals or States to elect in which kind they will transact their business or make and discharge their obligations; and, having elected, there cannot, in the nature of things, be any valid reason why they should not be held to their election: to hold to a contrary rule would be to offer a premium for Punic faith and give countenance to moral dishonesty. The mere fact that two kinds of money exist in which parties may lawfully perform their promises, of different values in fact, if not in law, necessitates a choice between them, for the minds of contracting parties cannot meet intelligently until a common standard of value in fact has been agreed upon, and no amount of legislation can obviate such necessity. If it is lawful to

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pay gold, it must of necessity be lawful to agree to pay it; and if both be lawful, the Courts may not only lawfully enforce the promise, but a refusal on their part to do so would outrage justice and shock the moral sense of mankind. This is truth crystalized, and no amount of blind patriotism, partisan clamor, or legal sophistry, can resolve it.

If, as this Court has repeatedly held, the Specific Contract *Act is not repugnant to the Legal Tender [158] Act, then by parity of reason the legislation of this State requiring all public dues to be paid in coin is not; for they both rest upon the same foundation—the right to elect between two mediums of payment, each of which is equally lawful—a right which the Federal Government has never found it necessary to deny, and has not denied to itself or anybody else, but has itself exercised and still does. If it is lawful for the Federal Government to collect its customs in gold, it is lawful for the State of California to collect its taxes and other public dues in gold, and that, too, independent of the question whether her sovereign power of taxation does not carry with it the minor power to determine in what currency her taxes shall be paid. If it is constitutional for the Legislature of this State—and this Court has repeatedly decided that it is—to require the principal upon the bond in suit to pay the money in suit in gold coin, then for the same reason it is constitutional for the Legislature to require his sureties to do it. If the Legislature has required the former to do it by the passage of the Specific Contract Act, then it has required both him and his sureties to do it by the passage of the acts to which I have referred.

But, as already stated, I do not propose to discuss this question. My present purpose has no further scope than to show that the claim in suit is a "public due" which cannot be paid, under the laws of this State and the former decisions of this Court, except in coin; that the collection and payment of "public dues" stand precisely where they stood before the passage of the Legal Tender Act—precisely where they would have stood had that act never been passed, and that if it is possible for the Legislature to so declare, it has done so in language not to be misunderstood.

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I am of the opinion that the judgment in this case, so far as it involves the question in hand, should be affirmed.

Mr. Chief Justice CURREY did not express any opinion.

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[159] *JOSEPH GENELLA v. CHAUNCEY RELYEA, AND JOHN MIDDLETON et als., AND JOHN MIDDLETON v. JOSEPH GENELLA et als.

[1] TIME WITHIN WHICH TO APPEAL.—The one year within which to appeal from a judgment commences to run at the time the Court announces its judgment and the order for judgment is entered in the minutes, and not at the time the Clerk enters the judgment in the Judgment Book.

NOTICE OF APPEAL.—A notice of appeal which states that the appeal is taken "from all orders of the District Court made and entered in the action," is insufficient.

[2] JUDGMENT.—The entry of a judgment in the Judgment Book is a mere ministerial duty of the Clerk.

[3] APPEAL FROM ORDER.—No appeal lies from an order striking out a statement, or from an order denying a motion to certify a statement.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

The above cause is but one action, and being on original bill to foreclose two mortgages, and on cross bill to set aside and cancel those mortgages, and another mortgage based upon the same title, both actions were tried together, and only one judgment was rendered in the Court below. The Court dismissed the bill to foreclose the mortgages, and gave judgment that they be cancelled and surrendered. The plaintiff, Genella, appealed. The respondent moved to dismiss the appeal.

The other facts are stated in the opinion of the Court.

J. W. Dwinelle, for the Motion.

E. L. B. Brooks, against the Motion.

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[1] Cited, Wetherbee v. Dunn, 36 Cal. 252.
[2] Explained, King v. Higgins, 3 Or. 412.
[3] Cited, Quivey v. Gambert, post 304; Kimball v. Semple, Cal. Sup. Ct., Jan. T., 1870, not reported.

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By the Court, SAWYER, J.:

The Court announced its judgment, and the order for judgment was entered in the minutes of the Court on the 15th of August, 1865. The judgment was therefore rendered, and the time for taking an appeal commenced to run on that day. (Gray *v.* Palmer, 28 Cal. 416; Peck *v.* Courtis, 31 Cal. 207.) But the judgment was actually drawn up in the form in which *it was designed to be entered, signed by the [160] Judge, and filed by the Clerk on the 9th of September, 1865, and nothing remained to be done except the mere ministerial duty, to be performed by the Clerk, of copying it into the Judgment Book. (Casement *v.* Ringgold, 28 Cal. 337.) The notice of appeal from this judgment was filed and served on the 11th of September, 1866. Whether we regard the 15th of August, or the 9th of September, 1865, as the date of the rendition of the judgment is, therefore, a matter of no consequence; for, in either case, more than a year had elapsed before the appeal was taken, and the time for taking an appeal from the judgment had expired.

As to that portion of the appeal "from all orders of the District Court, made and entered in the said two actions jointly and severally, either before or after judgment," the notice of appeal is too general. It points out no particular order, and is insufficient. But if, as supposed by respondent, the intention was to appeal from the orders of December 26th, 1865, striking out statement on motion for new trial, and refusing motion to certify statement, more than sixty days had elapsed after the entry of the orders before the service of notice of appeal, and the appeal was not in time. Besides, no appeal lies from those orders. (Pr. Act, sections 336 and 347; Leffingwell *v.* Griffing, 29 Cal. 193; Ketchum *v.* Crippen, 31 Cal. 365.) The appeal was not in time and must be dismissed, and it is so ordered.

Mr. Justice SHAFTER, being disqualified, did not sit in this case.

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THE PEOPLE v. HENRY SCHWARTZ.

[1] ACCESSORY TO CRIME.—Where a party is proceeded against as an accessory to a crime, it is better to indict him as an accessory than as a principal.

[1] INDICTMENT OF ACCESSORY.—When one is indicted as an accessory to a crime, the acts of the defendant should be stated as fully in the indictment as they are in the statute.

[2] INDICTMENT FOR BURNING A BUILDING INSURED.—An indictment for burning [161] a *building insured against fire, with intent to defraud an insurance company, should aver that the company is a corporation, if such be the fact, or that it is a partnership composed of certain individuals, naming them, if such be the fact, and that the act was done with intent to injure and defraud them in their associate capacity.

IDEM.—A mere averment of a company name in an indictment for burning an insured building with intent to defraud, amounts, in a legal sense, to an entire absence of any averment as to the party intended to be injured.

PROOF OF INCORPORATION.—If the indictment avers that the company is a corporation, proof of the existence of the corporation *de facto* will support the averment.

APPEAL from the County Court, city and county of San Francisco.

The following is the indictment found in this case:

"Henry Schwartz is accused by the grand jury of the city and county of San Francisco, State of California, by this indictment, found on this 2d day of November, A. D. 1866, of the crime of arson in the second degree, committed as follows: That said Henry Schwartz, on the 29th day of August, A. D. 1866, at the city, county, and State aforesaid, feloniously, wilfully, and maliciously did aid, abet and assist, advise and encourage, one Albert Selig to do and commit the crime of arson, as hereinafter set forth; that on said 29th day of August, 1866, at said city and county, the said Albert Selig, by the advice, aid, and assistance aforesaid of the said Henry Schwartz, did feloniously, wilfully, and maliciously set fire to and burn a certain building situate on Mission street, between Eighteenth and Nineteenth streets, of the property of the said Albert Selig; the said building being then, to wit, at

[1] Approved, People v. Campbell, 40 Cal. 142; People v. Valencia, 48 Cal. 555; State of Nevada v. Chapman, 6 Nev. 331; People v. Ouleveras, 48 Cal. 25.

[2] Cited, People v. Bogart, 36 Cal. 248.

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the time of the committing said felony, and at the time the said Henry Schwartz aided, abetted, assisted, advised, and encouraged the said Albert Selig to commit the felony aforesaid, insured against loss and damage by fire in the Phœnix Insurance Company, then doing business at said city and county, said company being legally established and doing business as aforesaid, with intent to injure, damage, and defraud said insurance company, and with intent on the part of said Henry Schwartz to damage, injure, and defraud said insurance company, *contrary to the form, force, [162] and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California."

The defendant demurred to the indictment because:

First, It did not charge whether he was absent or present when he aided, abetted, or assisted in the commission of the felony charged to have been committed by Albert Selig.

Second, That it did not charge whether he was present or absent when he advised or encouraged in the perpetration of said alleged crime.

Third, It did not charge that said insurance company was incorporated, or had a corporate or other name, or was capable of suing or being sued, or sufficiently charge that it was competent to do any insurance business, or suffer any damage or loss by reason of fire, or capable of being damaged or injured or defrauded.

The defendant was convicted and sentenced by the Court to the State Prison, and appealed.

The other facts are stated in the opinion of the Court.

S. B. Axtell, for Appellant.

This indictment does not advise the prisoner in ordinary and concise language of the facts of which he is accused. Either he was *present* as aider and abettor, or he was *absent* as an adviser, or accessory before the fact. While it is true that our statute makes him a principal in either case, it is submitted with confidence that the pleader ought to have stated what the actual fact was. It does not appear that this com-

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pany is either a corporation, body politic, or private individual. The language of this Court in the case of People *v.* Hughes, 29 Cal. 257, *implies* the correctness of our position that the indictment ought to state that the building was insured by a duly *incorporated* company, and that the intent was to cheat and defraud said *corporation.* (27 Vt. 772.)

Attorney-General, for the People.

[163] *Under our law, it was not necessary to state whether the defendant was present or absent. The District Attorney might have indicted the defendant as a principal. He saw fit to plead according to the actual facts, and the allegations are such that a man of common understanding can understand them. (People *v.* King, 27 Cal. 510; Crimes Act, sec. 11; People *v.* Hodges, 27 Cal. 340.) The crime under the statute is the intent to defraud the actual insurers. This company may have been shown to be a voluntary association, by the proof, as said in the 27 Vt. 723, and People *v.* Hughes, 29 Cal. 260.

By the Court, SANDERSON, J.:

The defendant was indicted for the crime of arson in the second degree, under the seventh section of the act of the 19th of April, 1856, which provides that "Every person who shall wilfully burn, or cause to be burned, any building, etc., * * * which shall be at the time insured against loss or damage by fire, with intent to injure or defraud such insurer; whether the same be the property of such person or any other, shall, upon conviction, be adjudged guilty of arson in the second degree and punished accordingly." (Stat. 1856, p. 132.)

He is charged as accessory, and the language of the indictment on that head is as follows: "That said Henry Schwartz on, etc., at, etc., feloniously, wilfully, and maliciously did aid, abet and assist, advise and encourage, one Albert Selig," etc. On the head of insurance and the intent to defraud, the language of the indictment is that the "building at, etc., * * * was insured against loss and damage by fire in the Phœnix Insurance Company, then doing business at, etc., * * *

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said company being legally established and doing business as aforesaid, with intent to injure, damage, and defraud said insurance company," etc.

The indictment was demurred to, in effect, upon the ground that in the parts above quoted there is a failure to state facts *sufficient to constitute the offence intended. [164] The demurrer was overruled, and we think erroneously.

Where a party is proceeded against as an accessory it is better to pursue the course attempted in this case and charge him as such rather than as principal, because such a course, if not absolutely necessary, is certainly more consistent with our system of pleading, which favors a statement of the facts constituting the offence as near as may be, precisely as they occurred. But care should be taken to state the acts of the defendant as fully as they are stated in the statute. When that has been done there can be no question as to the sufficiency of the indictment on that score, as this Court has repeatedly held. Now, without undertaking to say that this indictment is positively bad where it charges the acts which made the defendant an accessory, we think it is not in that respect what it ought to be. It does not fully come up to the language of the statute which defines an accessory. "An accessory is he or she who stands by and aids, abets, or assists; or who, not being present aiding, abetting, or assisting, hath advised and encouraged the perpetration of the crime." (Act concerning crimes, sec. 11.) Here are two modes of action, either of which renders the actor an accessory. If the former be the true one in a given case, let the indictment follow the statute and allege that the defendant "stood by, aided, abetted and assisted," etc., and so as to the latter. If it be doubtful as to which of the two modes is the true one, let both be charged, and all questions of variance between the allegations of the indictment and the testimony will then be avoided.

But passing this without further comment, we think the indictment bad on the second ground.

The one hundred and forty-eighth section of the act concerning crimes and punishments provides that "When any intent to injure, defraud, or cheat, is required by law to be shown in order to constitute any offence, it shall be sufficient,

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if such intent be to injure, defraud, or cheat the United States, this State, or any other State, Territory, or county, or the Government, or any public office thereof, or any [165] county, city, or *town, or any corporation, body politic or private individual." Now, in order to make the indictment fit the statute and respond directly to its requirements, it ought to allege that the Phœnix Insurance Company is a corporation, if such is the fact, or that it is a partnership, if such is the fact, composed of certain individuals, giving their names, and alleging that the act was done with intent to injure and defraud them in their associate capacity. This rule is applicable to pleadings of all kinds. In this State, it has been modified to some extent in civil cases by the provision of the six hundred and fifty-sixth section of the Practice Act, where two or more persons are associated in business under a common name. In such a case, they may be sued by the name under which they conduct their business; but the modification of the rule goes no further, and has no application to cases like the present. Had the one hundred and forty-eighth section of the act concerning crimes, quoted above, included associations or partnerships, as such in terms, it might be held to amount to a like modification of the rule in this class of cases, and that therefore the description given in this indictment of the party or parties intended to be injured is sufficient, but it does not, and the case is therefore left within the rule above stated.

There is no mistake in the name of the party intended to be injured, as in People *v.* Hughes, 29 Cal. 257, and the case does not therefore fall within the rule prescribed by the two hundred and forty-third section of the act concerning proceedings in criminal cases, which provides that an erroneous allegation as to the person intended to be injured shall not be deemed material where the offence is described with sufficient certainty in other respects to identify the act. The vice here is more radical than that which the statute was intended to remedy. It amounts, in a legal sense, to an entire absence of any averment as to the party intended to be injured, for the description is not of a private individual or of private individuals under a common name, or of a corporation,

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or of a body politic, or of any other parties named in the statute.

We cannot agree with the Attorney-General that the *language "said company being legally established," [166] used in the indictment, is equivalent to an averment that the company is a corporation. On the contrary, it is no averment at all, in a legal sense, for it is not the averment of a fact, and tenders no issue.

Nor can we agree with him that it cannot be necessary to aver that the company is a corporation, because, as we held in Hughes' case, it would not be necessary to prove that the company was legally incorporated in order to support the averment. What a given averment should be, and what amount of proof will support it, are very different questions. (State *v.* Mead, 27 Vt. 722.) If such is the fact, it should be averred that the company is a corporation, in order to satisfy the statute to which we have referred. That being done, proof of the existence of the corporation *de facto* will be sufficient to support the averment under the rules of evidence as stated in Hughes' case.

This disposes of the case, and makes the consideration of other points unnecessary.

Judgment reversed, and cause remanded.

ADELIA HILL *v.* JAMES SMITH.

NEW TRIAL.—A new trial should not be granted on the ground that the verdict is against evidence, unless the verdict is so clearly against evidence as to leave no room for doubt.

[1] INJURY TO WATER USED FOR MINING.—Where a large number of persons are mining on a small stream, and each deteriorates the water a little, so that the combined acts of all render the water unfit for use, each cannot successfully defend an action on the ground that his act alone did not materially affect the water.

APPEAL from the District Court, Fourteenth Judicial District, Placer county.

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[1] As to liability for injury to water rights, see Atchison *v.* Peterson, 1 Mont. 567.

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This was a second appeal in the same case. The first is reported in 27 Cal. 476, where the main facts are stated.

The other facts are stated in the opinion of the Court.

[167] *C. A. Tuttle*, for Appellant.

Jo. Hamilton, for Respondent.

By the Court, SAWYER, J.:

The law applicable to the case appears to us to have been correctly stated to the jury at the last trial, and the only ground that can be plausibly urged against the verdict is, that the evidence is insufficient to sustain it. That the quality of plaintiff's water was materially deteriorated in consequence of the sediment and tailings thrown into it by parties washing in the cañon above, and from other causes, is clear from the evidence. The defendant's claims were from two thousand to two thousand five hundred feet, or nearly half a mile, above the head of plaintiff's ditch. Defendant had a bed for his tailings on a flat in the side of the ravine, where, by means of a log dam, he confined them so as to prevent their running into the cañon. There is much testimony as to the effect of defendant's working upon the water, tending to show that it did not in any material degree deteriorate its quality, and further tending to show that the deterioration complained of was really produced by the mining of other parties, and by other causes. Upon this testimony, there is room for doubt whether the mining of the defendant produced any material injurious effect upon the water, and the jury found the issue for the defendant. We are not very well satisfied with the verdict on this point, yet it is not so clearly against the evidence as to justify us in setting it aside. It is the second verdict for defendant upon substantially the same general evidence, although it is brought out somewhat more clearly in his favor than on the first trial. The damage, if any, resulting from defendant's acts alone, may not have been large, but if there was any damage in consequence of the defendant's mining, the plaintiff ought to have recovered. Where there is a large number of persons mining on a small

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stream, if each should deteriorate the water a little, although the injury from the *act of one might be [168] small, the combined result of the acts of all might render the water utterly unfit for further use; and if each could successfully defend an action on the ground that his act alone did not materially affect the water, the prior appropriator might be deprived of its use, and at the same time be without a remedy. While we do not feel justified in setting aside the verdict, the circumstances of the case appear to us to call for these suggestions.

Judgment and order denying new trial affirmed.

SANDERSON, J., dissenting:

I dissent.

Mr. Chief Justice CURREY did not express any opinion.

HENRY MAHLER v. D. NEWBAUR, S. ELLSASSER, AND D. MYRES.

[1] TENDER OF MORTGAGE DEBT.—A party having no interest in the mortgaged premises or in the tender made, has no right to make a tender on his own behalf of the amount due on the mortgage.

IDEM.—When a tender of the amount due on a mortgage is made by a stranger, and not the party in interest, the creditor must be informed on whose behalf it is made; and if not so informed, the tender is invalid.

APPEAL from the District Court, Eleventh Judicial District, Eldorado county.

On the 26th day of December, 1860, the defendant, Newbaur, executed to the plaintiff, Mahler, a mortgage on a house and lot in Placerville, Eldorado county, to secure his promissory note given to Mahler for two thousand five hundred dollars. On the 9th day of June, 1862, Newbaur conveyed the mortgaged property to defendant Ellsasser. Prior to the conveyance to Ellsasser and September 18th, 1861, Newbaur

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[1] Cited, Ketchum v. Crippen, 37 Cal. 226.

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had executed another mortgage on the same property to M. Steinberg, who assigned the same to the defendant
[169] Myres. *This action was brought to foreclose the mortgage. The defendant Ellsasser alone answered, and set up in his answer that in November, 1864, he tendered the plaintiff the full amount due on the mortgage, which the plaintiff refused to accept, and that by means of the tender the mortgaged premises were discharged of the mortgage lien.

On the trial, defendant offered testimony tending to prove that George E. Williams, attorney at law for Ellsasser, made the tender. Defendant introduced testimony tending to show that when the tender was made, Mr. Williams did not tell the plaintiff that he made it on behalf of Ellsasser. The plaintiff recovered judgment, and the defendants appealed.

The other facts are stated in the opinion of the Court.

S. & George E. Williams, for Appellants.

Argued that the tender discharged the lien of the mortgage; and cited Kortright *v.* Cady, 21 N. Y. 343, and Hayes *v.* Josephi, 26 Cal. 535.

Johnson & Irwin, for Respondent,

Argued that the tender was not good, because not made in the name of Ellsasser; and cited Perre *v.* Castro, 14 Cal. 519.

By the Court, SAWYER, J.:

The defendant Newbaur executed the mortgage sought to be foreclosed, to the plaintiff. He subsequently mortgaged the same premises to Steinberg, who assigned to defendant Myres, and afterwards sold and conveyed to defendant Ellsasser. The defendants set up as a defence, a tender to the plaintiff, on behalf of Ellsasser, of the full amount due, after the law day of the mortgage, and a refusal of the plaintiff to receive it. The testimony of the plaintiff tends to show the tender set up. But upon the point, as to whether the plaintiff was informed that the tender was made on behalf of Ellsasser, the testimony is conflicting. There is no pretence that any tender was made on behalf of Newbaur or Myres. A

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*party having no interest in the premises, or tender [170] made, has no right to make a tender. The plaintiff would not be bound to regard a tender made by, or on behalf of, a stranger to the transactions. (Watkins v. Ashwicke, 1 Cro. Eliz. 132.) When a tender is in fact made by a stranger, and not the party in interest, it would seem to follow that the creditor must be informed on whose behalf it is made, otherwise he would not be required to accept the money, or reject it at his peril. Plaintiff testifies that he was not aware that Ellsasser had any interest in the mortgaged premises; that his name was not mentioned when Williams made the tender; and, that he supposed at the time, that Williams was acting on behalf of Myres. The note, in obedience to which plaintiff called upon Williams to receive the money due, tended to produce that impression; for it stated that "the parties in San Francisco have forwarded to me the amount of your mortgage on Newbaur's property, and I wish you to come to-morrow and I will pay you." Ellsasser resided at Victoria, Vancouver's Island. Myres was the only party residing at San Francisco, and no tender was made on his behalf.

It is true, Williams testifies that he informed plaintiff that the tender was on behalf of Ellsasser. But there is a plain conflict on the point, and the Court determined the question of fact in favor of plaintiff. This question appears to have been made in the Court below, and was one of the grounds upon which, after reconsidering the testimony, a new trial was denied. In specifying the grounds of the decision denying a new trial, as required by law, the Judge says: "I am not satisfied that at the time of the tender the plaintiff knew that the money was tendered by or on behalf of the defendant Ellsasser." We cannot disturb this finding on the evidence in the record. The tender having been made by a stranger, without informing plaintiff on whose behalf it was made, was invalid. The tender is not aided by the fact that plaintiff supposed it made on behalf of Myres, who was entitled to make it, for it was not in fact made on his behalf. On the ground indicated, the judgment must be affirmed, and it is *unnecessary to determine whether under the pro- [171] visions of our statute relating to the character of mort-

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gages, a tender after the law day discharges the mortgage, as was held in Kortright v. Cady, 21 N. Y. 343, and Caruthers v. Humphrey, 12 Mich. 277. (See Hayes v. Josephi, 26 Cal. 545.)

Judgment and order denying new trial affirmed.

THEODORE LE ROY v. EMERANTIENNE RASSETTE.

[1] New Trial.—If the party intending to move for a new trial does not file his statement within five days after giving notice of such intention, the statement should be disregarded.

[1] Idem.—A party giving notice of motion for a new trial is bound by that notice. He cannot afterwards give a second notice, and file his statement within five days of the second notice, but more than five days after the first notice.

Appeal from the District Court, Fourth Judicial District, city and county of San Francisco.

Defendant recovered judgment in the Court below, and the plaintiff appealed. The respondent renewed his motion to strike out the statement in the Supreme Court.

The other facts are stated in the opinion of the Court.

Edward J. Pringle, for Appellant.

Clarke & Carpentier, for Respondent.

By the Court, Shafter, J.

Motion to strike out statement. The findings were filed April 2d, 1866. Notice of the filing was given to the appellant on the 1st of May thereafter. The appellant gave notice of intention to move for a new trial on the 4th of May, and gave a new but like notice on the 11th of the same month. The appellant filed his proposed statement on the 16th of May, to which the respondent objected, and moved to strike it out. The motion was denied.

The plaintiff had ten days within which to give notice of

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[1] Cited, Campbell v. Jones, 41 Cal. 518; Bornheimer v. Baldwin, 42 Cal. 82.

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*his intention to move for a new trial after receiving [172] notice that the findings had been filed. But having elected to give his notice of intention on the 4th of May, he was bound by that choice for all the purposes of further procedure. This follows from the provision: "If no affidavit or statement be filed within five days after the notice * * * the right to move for a new trial shall be deemed waived." (Pr. Act, sec. 195.)

Motion granted.

RHODES, J., dissenting:

I dissent.

Mr. Chief Justice CURREY did not express any opinion.

DOMINIQUE ABADIE, JUAN ABADIE, AND MARELIUS ABADIE v. JOAQUIN CARRILLO.

JUDGMENT ROLL.—Until the amendment to the two hundred and third section of the Practice Act, the judgment roll was not required to contain the order sustaining or overruling a demurrer.

[1] APPEAL ON JUDGMENT ROLL.—If, prior to said time, a demurrer to the complaint was filed, and a judgment by default was entered, and the appeal rested on the judgment roll, and the same did not disclose what action was taken on the demurrer, the presumption was that the demurrer was disposed of, and that the necessary preliminary steps were taken to obtain judgment.

[2] COMPLAINT FOR GOODS SOLD.—A complaint for goods sold, which avers that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has not paid for the same, states a cause of action.

APPEAL from the District Court, Second Judicial District, Santa Barbara county.

The following was the complaint upon which judgment was rendered:

"The plaintiffs above named complain of the defendant, and for cause aver: That on the 11th day of August, 1863, the

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[1] Cited, McCarthy v. Yale, 39 Cal. 586.
[2] Cited, Pavisich v. Bean, 48 Cal. 365.

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defendant was indebted to the plaintiffs in the sum of
[173] one *thousand four and twenty hundredths dollars, ($1004 20–100,) on an account for goods sold and delivered by the plaintiffs to the defendant, at his request, in the city of Santa Barbara; and that no part thereof has been paid, and that there is now due them thereon, from the defendant, the sum of one thousand four and twenty hundredths dollars, with interest thereon from the 11th day of August, 1863.

"Wherefore they demand judgment as against the defendant, in the sum of $1004 20–100 dollars, with interest from the 11th day of August, 1863, with costs."

Plaintiffs had judgment by default, and defendant appealed.

The other facts are stated in the opinion of the Court.

S. F. & J. Reynolds, for Appellant.

The judgment in this case seems to have been entered without any reference to the demurrer as upon default—without the default having been entered by the Clerk. (Pr. Act, sec. 150.) If the demurrer was passed upon, and overruled, some discretion ought to have been exercised as to the allowance of an answer. It should at least appear that the judgment was upon the overruling of the demurrer. (Gallagher *v.* Delany, 10 Cal. 410; Thornton *v.* Borland, 12 Cal. 438; Smith *v.* Yreka Water Co., 14 Id. 201.) The demurrer was well taken, and should have been sustained. The complaint is not sufficient to sustain a judgment by default, even if no demurrer had been interposed, for it does not contain "a statement of the facts constituting the cause of action." It does not state, either the value of the goods sold or a promise to pay the sum claimed. Neither an *assumpsit*, nor the facts from which it can be implied, are averred. (Mershon *v.* Randall, 4 Cal. 324–6; Piercy *v.* Sabin, 10 Id. 27, 28; Green *v.* Palmer, 15 Id. 414 *et seq.*; DeWitt *v.* Porter, 13 Id. 171.)

Eugene Lies, for Respondent.

Appellant's first point cannot be raised in this Court. He appeals upon the judgment roll, without statement or
[174] bill of *exceptions. No error on this point seems to

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have been assigned below, and this Court will not consider it when raised here for the first time. (Morgan v. Hugg, 5 Cal. 409; McCartney v. Fitz Henry, 16 Cal. 184; Collier v. Corbett, 15 Cal. 183.) This Court will intend that the demurrer was properly overruled before judgment. (Seale v. McLaughlin, 28 Cal. 673.) The complaint in this cause is a literal copy from Abbott's Form Book, p. 79. This form appears to have been supported in the following cases, among many others: Allen v. Patterson, 3 Seld. 476; Tucker v. Rushton, 2 Code R. 59; Adams v. Holley, 12 How. Pr. 326. And in the case of Cudlip v. Whipple, Abb. Pr. 106, a motion to make such a complaint more definite and certain was denied by Mr. Chief Justice Oakley. (See also Chamberlain v. Kaylor, 2 E. D. Smith, 134.)

By the Court, SAWYER, J.:

The appeal rests on the judgment roll alone. The judgment roll does not disclose what the action upon the demurrer was. Nor is it to be expected that it would, for, before the recent amendment, section two hundred and three did not require it to contain the order sustaining or overruling the demurrer. It, therefore, does not appear whether time to answer was given or not. The defendant appeared by demurring, and the subsequent proceedings were necessarily had under the direction of the Court. Final judgment was entered in open Court, by order of the Court, and all intendments are in favor of its correct action. Nothing to the contrary appearing, it must be presumed that the demurrer was disposed of, and that the necessary preliminary steps which are not required to appear in the judgment roll were taken.

The point of the demurrer is, that the complaint does not state the value of the goods, or a promise to pay the sum claimed. The complaint is in the precise form of the complaint which was held to be sufficient by the Court of Appeals of New York in Allen v. Patterson, 3 Seld. 476. The Court *say (479): "It contains every statement of fact [175] necessary to constitute a good *indebitatus* count in debt, according to the mode of pleading before the code." (2 Ch. Pl., ed. 1812, p. 142; Emery v. Fell, 2 Term R. 28; 1 Ch. Pl.

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345.) Our predecessors frequently held that the ordinary forms of counts is *indebitatus assumpsit*, for goods sold and delivered, etc., were sufficient. (Freeborn *v.* Glazier, 10 Cal. 338; DeWitt *v.* Potter, 13 Id. 171; Higgins *v.* Horrell, 18 Id. 333.) But in Wilkins *v.* Stidger, 22 Cal. 235, the precise question now presented was raised, and the complaint held to be good. Mr. Justice Crocker says: "The first error assigned is, that the complaint does not state facts sufficient to constitute a cause of action, because that portion of the complaint which sets forth the claim for professional services does not aver a promise to pay, or that the services were of any value. We think the complaint is in this respect sufficient. It follows substantially the form of a count in debt, under the old system of pleadings." As in the case of Allen *v.* Patterson, before cited, it was put upon the ground, that it would be a good count in debt at common law. Upon the authority of these cases we hold the complaint sufficient. Judgment affirmed.

Mr. Justice SANDERSON delivered the following concurring opinion, in which Mr. Justice RHODES concurred:

If the question presented by the record in this case was new, I should be inclined to hold the complaint bad, upon the ground that it does not state facts sufficient to constitute a cause of action. Notwithstanding the many decisions to the contrary, I have never been able to regard the common counts as consistent with our code of practice, which was intended to provide a uniform mode of pleading in all cases. The fundamental rule in our system of pleading requires a statement of the facts constituting the cause of action or defence in ordinary and concise language, so that the precise matters intended may appear upon the face of the pleading, and
[176] the *opposite party need not be put upon his outside knowledge for the purpose of ascertaining what is meant. I do not think the common counts satisfy this rule, and must regard their retention as impairing the symmetry of our system; but a contrary view was adopted at the outset, and has been uniformly adhered to since. The matter is not of sufficient importance to justify us in disturbing a rule so long settled. For these reasons I concur in the judgment.

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STEPHEN MARSHALL v. OSCAR L. SHAFTER, JAMES McM. SHAFTER, TRENOR W. PARK, AND SOLOMON HEYDENFELDT et als.

EVIDENCE IN EJECTMENT.—The defendant in ejectment may, under a general denial in his answer, give in evidence title in himself.

ANSWER IN EJECTMENT.—An allegation in an answer of the defendant in ejectment, of title in himself, does not constitute new matter, and is only equivalent to a general denial of title in the plaintiff.

[1] COMPLAINT IN EJECTMENT.—An allegation in a complaint in ejectment, that the plaintiff, on a day named, "was possessed of" certain lands therein described, "which said premises the said plaintiff claims in fee simple absolute," is an allegation of title in the plaintiff to the premises in fee simple absolute.

[1] CONSTRUCTION OF PLEADINGS.—The rule requiring the pleading to be most strongly construed against the pleader does not require such a construction to be given (if it will reasonably bear a different one) as will make the pleading absurd.

FACTS IN ISSUE AND PROBATIVE FACTS.—The title of the plaintiff is the ultimate fact, the fact in issue, upon which a recovery must be had in ejectment. The facts established by the plaintiff going to support his alleged title are probative facts, which, if disputed by the defendant, are facts in controversy.

[2] AVERMENT OF OUSTER IN COMPLAINT.—It is not necessary in a complaint in ejectment to aver an ouster by the defendant. An averment of a wrongful withholding of the possession by the defendant is equivalent to an averment of an ouster.

WHAT IS TRIED IN EJECTMENT.—It is the right to the possession as between the parties that is tried in ejectment, and this right to the possession is title.

JUDGMENT IN EJECTMENT.—The party who recovers in ejectment, after a trial on the merits, is successful because his is the best title, whether the plaintiff recovers upon title presumed from prior possession, or the defendant in possession recovers upon the legal presumption of title until true title or prior possession is shown in the plaintiff.

[3] ISSUE IN EJECTMENT AS TO TITLE.—If the plaintiff, in his complaint in ejectment, avers title in himself, and the defendant interposes a general denial, the respective titles of the plaintiff and the defendant are put in issue.

[4] WHEN JUDGMENT IN EJECTMENT IS AN ESTOPPEL.—If the respective titles of the parties, or their right to the possession of the demanded premises, are put in issue, *and tried, in ejectment, and the plaintiff recovers judgment for [177] possession, the judgment is an estoppel, and the defendant to avoid the estoppel in a subsequent action to recover the same premises, must show some other right of possession than he had when the judgment was rendered.

[4] IDEM.—The fact that a judgment in ejectment is not that plaintiff recover the title, but only that he recover the possession, does not prevent the judgment from being an estoppel as to whatever rights the parties respectively possessed.

TESTIMONY IN EJECTMENT.—If the plaintiff in ejectment recovers upon the ground that, as a redemptioner, he had redeemed the demanded premises from a pur-

[1] Cited, Henley v. Hotaling, 41 Cal. 29.
[2] Cited, Salmon v. Wilson, 41 Cal. 610.
[3] Cited, Bruck v. Tucker, 42 Cal. 349.
[4] Cited, Satterlee v. Bliss, 36 Cal. 514; Thompson v. McKay, 41 Cal. 227.

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chase made at a judicial sale by the defendant, and the defendant afterwards sues him to recover the same premises, he cannot introduce testimony to show that the redemption was not in fact made, even if in the second trial the defendant introduce his redemption deed.

TESTIMONY TO IMPEACH JUDGMENT.—Testimony cannot be introduced to show that a former judgment between the same parties upon the same subject-matter was erroneous.

[1] ESTOPPEL BY JUDGMENT.—If in an action to set aside a deed as a cloud on plaintiff's title there is more than one defendant, and plaintiff recovers judgment against one, but the bill is dismissed as to the other defendant, this judgment does not estop plaintiff as to the title, in a suit to recover possession of the same land afterwards brought by the defendant as to whom the bill was dismissed.

JUDGMENT IN ACTION TO SET ASIDE DEED.—A judgment in favor of the plaintiff, against one of several defendants, in an action to set aside a deed as a cloud upon the plaintiff's title, is an adjudication that the title is in the plaintiff.

APPEAL from the District Court, Twelfth Judicial District, city and county of San Francisco.

Action to recover possession of an undivided half of eleven square leagues of land, known as the Punta de Reyes Ranch, lying in Marin county, and also two square leagues of land adjoining said eleven leagues, and lying in the same county. The first tract was granted by Manuel Micheltoreno, Governor of Upper California, to Antonio Maria Osio, on the 30th day of November, 1843, and was afterwards confirmed by the Board of Land Commissioners to Andrew Randall. The second tract was granted by Juan B. Alvarado, Governor of Upper California, to Joseph F. Snook, on the 8th day of June, 1839, and was also confirmed by the Commissioners, to said Randall.

The plaintiff averred in his complaint that on the 3d day of September, 1860, he was the owner in fee simple and seized of and as such entitled to the possession of the [178] demanded *premises, and that while so the owner and entitled to the possession, the defendants took unlawful possession, etc.

The defendants' answer consisted of three parts: First, a general denial. Second, an allegation that long before and at and since the 3d day of September, 1860, and since the 6th day of May, 1857, the defendants, O. L. Shafter, J. McM.

[1] Cited, Satterlee v. Bliss, 36 Cal. 514; Thompson v. McKay, 41 Cal. 227.

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Shafter, T. W. Park, and Solomon Heydenfeldt, had been the owners in fee simple of the demanded premises, and had been in possession of the same as owners, and by the other defendants, who were their tenants. Third, the answer set up that on the 21st day of February, 1857, Robert McMillan, the defendants' grantor, commenced an action in the District Court of the Seventh Judicial District, Marin county, against Thomas G. Richards, Samuel F. Reynolds, and John Reynolds, the plaintiff's grantors, to recover possession of the same premises, and that such proceedings were had in the action; that on the 31st day of May, 1858, the District Court (in pursuance of a judgment of the Supreme Court reversing a former judgment for the defendants in the action, and directing a judgment to be entered for the plaintiff) gave judgment, awarding said McMillan possession of the premises; and that on the 6th day of May, 1857, the defendants, O. L. Shafter, James McM. Shafter, and S. Heydenfeldt, purchased the land from said McMillan, and that in the year 1860, about the 3d of September, S. F. Reynolds and John Reynolds, the defendants in the suit of McMillan *v.* Richards and themselves, executed to the plaintiff Marshall a deed of the premises, and that Marshall had no other title. The answer prayed judgment that the plaintiff be estopped by the record of the judgment in McMillan *v.* Richards et al., from having or maintaining his action. The case of McMillan *v.* Richards will be found reported in 9 Cal. 365, where there is a full statement of the facts out of which the present controversy arose.

The complaint in the case of McMillan *v.* Richards was as follows:

*"The above named plaintiff, resident in the city [179] and county of San Francisco and State of California, complains against the above named defendants, and for cause of action says that heretofore, to wit, on the 17th day of March, A. D. 1856, the said plaintiff was possessed of certain lands with the appurtenances, situate in the county of Marin and State of California, described as follows, to wit: All that tract of land situate in Marin county, State of Cali-

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fornia, and bounded on the westerly side by the Pacific Ocean, on the northerly side by the Estero of Tomales, on the southerly side by Sir Francis Drake's Bay and the ocean, and on the easterly side by lands granted to Rafael Garcia and to Joseph Francis Snook, being all that grant of land for eleven square leagues by Manuel Micheltoreno, Governor of Upper California, to Antonio Maria Osio, November 30th, 1843, and since confirmed to Andrew Randall by the Board of United States Land Commissioners appointed to ascertain and settle private land claims in the State of California, Case No. 666—for a further and more particular description of said land, reference is made to the grant and papers on file in the office of said Commissioners, in said Case No. 666; and also, all that tract or parcel of land situate in Marin county, State of California, adjoining the land granted to James Richard Berri, being the grant of land made to Joseph Francis Snook by Juan B. Alvarado, Governor of California, on the 8th day of June, A. D. 1839, for two square leagues of land, and confirmed to the said Snook by the Departmental Junta of California on May 22d, 1840, as the land of Tomales, and being the land since confirmed to said Andrew Randall by the Board of United States Land Commissioners appointed to ascertain and settle private land claims in the State of California, in Case No. 772—for a further and more particular description of which, reference is made to the grant and papers on file in the office of said Commissioners in said Case No. 772; and the said parcel of land adjoins the parcel first hereinbefore described, and both lie in and constitute one body of land, which said premises the said plaintiff claims in fee simple absolute.

[180] *"And the said plaintiff, being so possessed thereof, and being so the owner thereof, as aforesaid, the said defendants afterwards, to wit, on the 18th day of March, A. D. 1856, entered into the said premises and ejected the plaintiff therefrom, and have ever since, and now do, unjustly withhold from the said plaintiff the possession thereof, taking the whole rents and profits to themselves, to the damage of the plaintiff, as he says, ten thousand dollars.

"And for another and distinct cause of action the plaintiff

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says that heretofore, to wit, on the 14th day of January, A. D. 1857, he was the owner in fee simple absolute of one undivided third part of the lands in the first count described, and by reason thereof was then and there entitled, and ever since has been entitled, by reason of such ownership, to the sole possession of said lands as against all and singular the said defendants; and the plaintiff further says that afterwards, to wit, on the day aforesaid, the said defendants wrongfully disseized, deforced, and dispossessed the said plaintiff of the said lands, and they then and there unlawfully and without leave or license of the said plaintiff, and against his consent, took and withheld, and ever since have withheld, and now withhold from him the possession of said lands, taking the whole rents and profits to themselves, to the damage of the plaintiff, as he says, ten thousand dollars.

"Wherefore, he prays judgment, that the said lands may be restored to him, and for ten thousand dollars damages, and for his costs."

The answer of the defendants was as follows:

"Thomas G. Richards, Samuel F. Reynolds, and John Reynolds, three of the defendants in the above entitled action named, by John Currey, their attorney, answering the complaint of the said plaintiff, say: They deny each and every allegation in said complaint contained.

"And for further answer, these defendants say that for a long time, to wit, for the space of one year next before the commencement of this action, they have been and still are the *owners of the real estate in said complaint [181] mentioned and described, and therefore lawfully seized as the owners of the same, and as such owners were, at the commencement of this action, lawfully in the possession of said real estate.

"And these defendants further say that for a long time, to wit, for one year next before the commencement of this action, the said defendant Richards and the said Samuel F. Reynolds have been and still are owners, as tenants in common, of said real estate, excepting about three thousand acres of the land mentioned in said complaint, lying and being at the extreme

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southern point of said real estate described as aforesaid, which point of land is called 'Punta de los Reyes' Point; and that at the commencement of this action the said defendant, John Reynolds, was and still is the owner of the above mentioned three thousand acres of said real estate situated and being at the extreme southern point of said land described in said complaint, which point is commonly called 'Punta de los Reyes' Point; and that at the commencement of this action these defendants were respectively seized and in possession of said real estate according to their respective rights and interests therein, as herein stated, and are still so lawfully seized and possessed of the same.

"Wherefore, defendants pray for judgment against the plaintiff for their costs," etc.

The judgment finally entered by the District Court in said action was that the plaintiff have and recover possession of the premises described in the complaint. After this judgment, and on the 3d day of September, 1860, John Reynolds and S. F. Reynolds conveyed their right, title, and interest in the demanded premises to plaintiff, Marshall, for the purpose of having the plaintiff hold the same in trust for them.

This action was tried before the Court at the July term, 1865, without a jury. On the trial, the plaintiff, to maintain the issues therein on his part, offered and read in evidence two patents from the United States to Andrew Randall, in due form, each dated on the 4th day of June, A. D. 1860, [182] and *based upon two several grants made by the Mexican Government to Antonio M. Osio, in 1839 and 1843 respectively, to the lands described in the complaint, which had been duly confirmed to said Andrew Randall by the Board of United States Commissioners to settle private land claims in the State of California. The plaintiff then proved a deraignment of title to Samuel F. Reynolds and John Reynolds, from said Randall. Plaintiff then introduced and read in evidence a deed from said Samuel F. Reynolds and John Reynolds, conveying to him all their right, title, and interest in and to said premises, which deed bears date September 3d, 1860. The defendants then offered in evidence, as an

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estoppel, under the third plea, and for no other purpose, the judgment roll in McMillan *v.* Richards et al. To the introduction and reading of which judgment roll in evidence the plaintiff objected, on the grounds that it was irrelevant, immaterial, and insufficient for the purpose for which it was offered; and further, that it was inadmissible under the pleading—which objections were each and all by the Court overruled, and the plaintiff duly excepted—and the said judgment roll was read in evidence. The defendants then offered in evidence a deed from said McMillan to the defendants Shafters, Park, and Heydenfeldt, dated May 6th, 1857, recorded August 22d, 1857, conveying the whole of the demanded premises to them. The plaintiff during the trial offered in evidence the judgment roll in the case of the Shafters, Park, and Heydenfeldt against Elizabeth A. Reynolds, John Reynolds, Samuel F. Reynolds, and Thomas G. Richards, which action was commenced in the District Court of the Seventh Judicial District, Marin county, on the 1st day of June, 1858, to set aside a deed executed to said Elizabeth A. Reynolds by John W. Hendrie, as a cloud upon the plaintiff's title. The two Reynolds, S. F. and John, appeared and answered in the action. Richards made default, and a judgment was rendered dismissing it as to S. F. and John Reynolds, but adjudging the deed null and void, and directing the defendant, Elizabeth Reynolds, to execute a deed to the plaintiffs.

*The Court below in this action rendered judgment in [183] favor of the defendants, and the plaintiffs appealed.

The other facts are stated in the opinion of the Court.

John Reynolds, for Appellant.

The judgment in McMillan *v.* Richards et als., as pleaded, is no bar to this action. The action in which it was recovered appears from this answer to have been simply an action of ejectment to recover the possession of the premises in controversy. The averment of the answer is: "That Robert McMillan, on the 21st day of February, 1857, filed in the Seventh District Court his complaint against Thomas G. Richards, John G. Hyatt, James P. Williamson, Josiah H. Swain, George Randall, A. W. Sanford, John Doe, Richard

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Roe, Samuel F. Reynolds, and John Reynolds, by which complaint said McMillan complained and declared against said defendants in a plea for that he, the said McMillan, on the 17th day of March, 1856, was possessed of the same premises in the complaint in this action mentioned, and therein claimed the same in fee simple absolute; and that said McMillan being so possessed thereof and being so the owner thereof as aforesaid, the said defendants, in that action mentioned, afterwards, to wit, on the 18th day of March, 1856, entered into the said premises and ejected the said McMillan therefrom, and from that time did unjustly withhold from the said McMillan the possession thereof, taking the whole rents and profits to themselves, to the damage of the said McMillan ten thousand dollars." (Long *v.* Neville, 29 Cal. 131; Wattson *v.* Dowling, 26 Id. 127; Hawkins *v.* Reichert, 28 Id. 535; Vance *v.* Olinger, 27 Id. 358; Garner *v.* Marshall, 9 Id. 270; Dutton *v.* Warschauer, 21 Id. 609; Lyle *v.* Rollins, 25 Id. 440; Yount *v.* Howell, 14 Id. 468; Calderwood *v.* Braly, 28 Id. 97.) The joint answer of Richards, and S. F. and J. Reynolds, averred after a general denial, "for a further answer," that they were owners in fee of the premises, but did not claim any affirmative relief. It stated no more than might have been given in evidence under the general denial, [184] and did not therefore contain any *new matter, and no issue could be made upon it. (Woodworth *v.* Knowlton, 22 Cal. 167; Bell *v.* Brown, 22 Id. 681; Frisch *v.* Caler, 21 Id. 74; Goddard *v.* Fulton, 21 Id. 435; Pr. Act, sec. 153, sub. 2.) It does not even appear that the defendants pleaded title as a separate defence. (Pr. Act, sec. 64, sub. 7.) What issues were formed in the action of McMillan *v.* Richards et als., and what the character of that action was, must therefore be determined from McMillan's complaint alone. The answer in this case does not aver that any issue was tendered by that complaint, in any manner affecting the title; nor does the judgment purport to determine any question relating to the title. There is no issue shown to have been tried in that action, which can estop the plaintiff from maintaining this. What the *issues* are in any action must be determined by the *material* averments of the complaint, and the *new matter* in

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the answer, upon which some affirmative relief is claimed. (Pr. Act, sec. 153.) And as the answer of the defendants, under whom the plaintiff in this suit claims, contained no new matter, the averments of McMillan's complaint must alone determine what the issues were, to be tried in his suit. All that is said in the answer in this case as to McMillan's having pleaded title in that, is that he therein claimed the same premises in fee simple absolute. This is not equivalent to an averment that he counted on title in that case. Estoppels must be pleaded with exactness and certainty. (2 Smith's Lead. Cas. 489; Coke on Litt. 352 *b*.) It was claimed in the Court below, that the findings of fact, upon which the judgment was pronounced in that case, estopped the plaintiff in this. The findings of the Court are the ascertainment of probative facts, from which ultimate conclusions are determined. They find the facts *in controversy*, as distinguishable from the facts *in issue*. It is the result or conclusion to which the Court comes in its judgment upon the facts in controversy—limited by the issues made by the pleadings—that determines the extent of the estoppel. In cases tried by the Court, without a jury, the Court finds the *several facts* upon which a *single issue* is decided. (Prac. Act, sec. 180.)

*In every case the effect of a verdict or the findings of [185]
the Court, as an estoppel, must be limited to the issues made by the pleadings. In McMillan *v.* Richards, the complaint averred that McMillan was possessed of the premises on the 17th day of March, 1856, * * * which said premises the said plaintiff claims in fee simple absolute." These are the only direct averments as to title, or claim of title. It will hardly be contended that the simple averment of possession presents any issue upon the title; and I think it can with as little plausibility be claimed by the learned gentleman upon the other side, that a mere assertion that the plaintiff claims title in fee, when he files his complaint, presents any issue whatever. An averment that a party has title, is quite a different proposition from saying that he was in possession on a certain day, and that he *now* claims title from such possession. It is not even averred that he claimed title while he was in possession. The complaint then proceeds to make the aver-

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ments which really constitute the *gravamen* of the action, "that being so in possession, and so the owner thereof, as aforesaid, the said defendants, afterwards, to wit, on the 18th day of March, 1856, entered into the said premises and ejected the plaintiff therefrom, and have ever since, and now do, unjustly withhold from the plaintiff the possession thereof, taking the whole rents and profit to themselves, to the damage of the plaintiff, as he says, of $10,000." There is no averment of ownership in this part of the complaint, but only a recital limited by the previous averment, which is only such ownership as results from a possession without claim of title; for the claim of title is not averred to have been made until after the ouster. The *gravamen* of that action was the ouster, and, incident to that, the damages resulting from it. And the complaint is evidently drawn with the design of presenting as few issues as possible to sustain this cause of action. There is nothing, I submit, in that complaint which "can be tortured" into an averment of title in McMillan. If the plaintiffs in the action of the Shafters, Park, and Heydenfeldt *against* [186] Elizabeth *A. Reynolds et al., to set aside the deed as a cloud on their title, had prevailed against all the defendants, they could have had a decree which would have estopped all those defendants from asserting that plaintiffs therein had not the title and right of possession. If the decree which I have supposed could have been upheld upon the bill confessed, or all its averments proven, then I submit that a dismissal on a trial has the same effect as an estoppel, in the defendants' favor, as a decree to the full extent warranted by the averments of the bill would have operated in favor of the plaintiffs. The effect of the dismissal of a bill in equity on a trial and full hearing, is the same as a verdict for defendant in an action at law. (Holmes *v.* Remson, 7 Johns. Ch. 286, see page 290 for opinion; Morgan *v.* Patten, 4 Mon. 453–8; Cowen and Hill's Notes, note 639 to p. 358 of text.) I submit with confidence that the issue upon plaintiffs' title in that case was tried and decided adversely to them, as to the defendants J. and S. F. Reynolds, for the decree entered would have been a legal impossibility without such decision. (2 Kern. 187–189; Davis *v.* Tallcot; 2 Smith's L. Cases, 494.)

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J. McM. Shafter, for Respondents.

Accepting appellant's statement as to the nature of the former action, one thing is certain: In it as of April 29th, 1857, McMillan *obtained judgment "for the seizin and possession"* of the premises in controversy of the very parties under whom the plaintiff, Marshall, directly claims. The words "seizin and possession" are in the answer: they are truly plead, and the demurrer admits this truth. Put the case, then, upon the appellant's own ground, and the former recovery is a bar to this action. I admit this action can be looked at as it concerns the title and estate; in other words, right of the party in and to the property, as well as to the precise aid which is prayed in the complaint. In this last view, the action is possessory: nothing but possession is directly recovered. In this respect, the former action and the present are identical. The *prayer of judgment in the [187] complaint, in each action, is for possession. The former judgment is admitted to be conclusive that April 29th, A. D. 1857, McMillan had the right of possession. That right of possession was continuous in its nature, and must be presumed to continue until it is affirmatively shown to have terminated. In the ancient action of ejectment, the judgment disclosed the duration of the term, and on its face limited the duration of the right of possession. Here, upon the face of the judgment, the term is unlimited, and the presumption is in favor of the continuance of the right. (1 Greenl. Ev., sec. 41.) In Caperton *v.* Schmidt, 26 Cal. 513, in speaking of the finality of the judgment, the Court say that it is limited to the right of the parties as they existed at the time of judgment; and upon any new right arising after judgment, the estoppel does not operate. While the plaintiff does not state the proposition in terms, yet it is distinctly involved in the terms he does use, that he considers this action to go upon a *gravamen* entirely different from that tried in the former action, that in that action the temporary right of possession alone was tried, while in this, as plaintiff avers, "he is the owner in fee simple, and seized of, and, as such, entitled to the possession" of the premises, he has emancipated him-

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self from all the rules belonging to that "possessory action" of ejectment, and from the effect of the former recovery. In this connection, the Court's attention is directed to the fact that the title under which plaintiff now claims *antedates the former judgment.* Plaintiff now claims that that title must not be considered as having been litigated, because the *former pleadings* and judgment did not state the question of title with proper precision, so that it can be seen therefrom that the title was decided. At the same time, their present action goes directly upon the ground that their claim *would have been a valid defence* to McMillan's action, as it is now claimed to be a valid ground of recovery against his grantees. (Le Guen *v.* Goveneur, 1 John. Cas. 436; Bruen *v.* Hone, 2 Barr. 586; Hill & Cowen's Notes, vol. ii., 20–1.) The point of the appellant is, that McMillan's assertion that "he claims [188] the premises *in fee simple absolute," does not tender an issue upon the title. The statement in the complaint of the facts must be "in ordinary and concise language." The definition of pleadings is "the formal allegation by the parties of their respective claims and defences." Supposing a plaintiff should commence this action by these words: "He complains of the defendant, and for cause of action claims he was owner and possessed," would not this be a good averment? Is the language not ordinary and concise? Is it not as ordinary and concise as "in fact saith," "for that whereas," "heretofore," "to wit?" Furthermore, does it not advise the defendant (the true object of the complaint) of precisely the demand made upon him? But the complaint does not stop here. It proceeds: "And the said plaintiff being so possessed thereof, and being so the owner thereof, as aforesaid," the defendant ousted him. 1 Chitty Pleadings, 325: "In point of form, an averment may be in *any words amounting* to an express allegation, as that plaintiff *avers*, or *in fact saith*, or *although*, or *because*, or *with this*, or *being*," etc. The words "being so the owner thereof" are then even in point of form within the strictest rule. If the complaint contained only the averment of possession, then the general denial put that in issue. I contend that even under such an averment, plaintiff could have proved title,

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because the statute attaches to title—possession. Proof of title then would support the issue upon plaintiff's part. But however that may be, the general denial was enough for the defendants. *Why, then, did defendants put in an answer averring title, seizin, and possession in themselves?* Such course could only be justified by their conviction that our complaint averred title in McMillan, or that having averred possession alone, they were entitled to bring forward *their title* as new matter, and under it to justify their possession. No matter what their view was, their answer was not a nullity. It tendered an issue upon the defendants' title, and the statute attached to it a traverse by McMillan.

*By the Court, RHODES, J.: [189]

The leading question in this case is, whether the defendants can rely upon, and are protected by the recovery in the case of McMillan *v.* Richards, 9 Cal. 365, set up in their third answer by way of estoppel. Counsel have discussed the case with great ability, and have urged many points in support of their respective positions, and we have given them the attentive consideration that the magnitude of the interests involved, and the importance of the questions argued, would require at our hands; but the line of argument we shall adopt in deciding the controversy will render it unnecessary to discuss or even allude to very many of the propositions advanced. The rules laid down in Caperton *v.* Schmidt, 26 Cal. 479; Gray *v.* Dougherty, 25 Id. 266; and Garwood *v.* Garwood, 29 Id. 514, are decisive of every question necessarily arising in this branch of the case, and it will be unnecessary to go beyond the principles announced and affirmed in those cases. The plaintiff does not propose to attack the decision in Caperton *v.* Schmidt, nor deny the authority of any of the doctrines therein advanced, but insists that under that decision and those doctrines, the defendants cannot avail themselves of the former judgment as a bar, nor of the fact in issue upon which the recovery proceeds, as an estoppel in this action.

The leading facts out of which the controversy in the former case arose may be briefly stated as follows: Osio mortgaged the premises in 1851, and in 1853 he conveyed the legal title

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to Randall. Cary, the assignee of the mortgage, in 1854, obtained judgment of foreclosure, and the appeal taken therefrom by Randall was dismissed in 1856. The premises were sold under the foreclosure, June 14th, 1856, and were conveyed to Hyatt, January 19th, 1857, and within a month thereafter he conveyed the same to Richards, S. F. Reynolds, and J. Reynolds. On the 7th of February, 1855, McMillan filed in the Recorder's office a transcript of the docket of a judgment in his favor against Randall, and under an execution issued upon the judgment, the premises were sold to
[190] *McMillan, March 17th, 1856, and in pursuance thereof, on the 26th of December, 1856, the Sheriff executed to him a conveyance of the premises. On the 13th of December, 1856, McMillan served on the Sheriff a notice of redemption of the premises from the sale under the Cary foreclosure, and paid him a certain sum of money which, it was claimed on his part, operated as a redemption, and in 1858, subsequent to the commencement of the suit of McMillan *v.* Richards, the Sheriff, in pursuance of the redemption, executed a deed to Shafter, Park, and Heydenfeldt, as the vendees of McMillan. The District Court, in the case of McMillan *v.* Richards, gave judgment for the defendants, but on appeal the judgment was reversed, and it was ordered that judgment be entered for the plaintiff.

In this case, the contest centers in the third answer. We shall not consider separately the demurrer to the answer and the objections to the admission of the judgment roll in McMillan *v.* Richards, for both questions rest on the same ground. The plaintiff contends that title, though it may have been a fact in controversy, was not a fact in issue in that case; that in order to ascertain what facts were in issue, we must look to the complaint alone. In view of the system of pleading and practice in force in this State, under which the defendant in ejectment may plead new matter, raising a material issue in the case, the argument of the plaintiff would not lead to the conclusion, that in the inquiry for the issues recourse must be had solely to the complaint. It is proper at this point, however, to say that it is settled beyond all controversy in this State that the defendant may, under the general denial, give

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in evidence title in himself, and it follows that the allegation of such title in the answer does not constitute new matter, and therefore the allegation of title in the defendant does not present a new issue.

What was the issue tendered in the complaint in McMillan v. Richards? It is therein alleged that the plaintiff, on a day named, "was possessed of certain lands therein described, which said premises the said plaintiff claims in fee simple absolute." The plaintiff insists that this is not an allegation *of ownership in fee, but amounts only to this, [191] that the plaintiff claims such title, without saying that he in fact holds it; that a denial of that branch of the allegation would amount only to a denial that the plaintiff claimed such title, which of course would be an immaterial issue in the action of ejectment. The defendant argues that the word "claims" is equivalent to "says," "avers," "states," or "shows." But substituting each of those words for "claims," it would be necessary to interpolate the words "he owns," or others of the same import, in order to make the sentence sufficient by itself to present the issue of title. "Claim," when used as a noun and in relation to land, has, in most of the States, a signification beyond that of a mere demand—a right not reduced to enjoyment but to be enforced against another—but it is used as well to express all the rights which a person holds and enjoys in the land. Preëmption claims, homestead claims, and mining claims are familiar instances. A conveyance of the grantor's claim to the land passes all the title he holds. And so of the verb "claim." In common speech, a person says he claims the land to which he has the title, and in a contest for the possession, each party, relying on title alone, would perhaps as frequently say that he claimed title, as that he held the title.

The allegation mentioned is followed by the further allegation that he "being so possessed thereof, and being so the owner thereof as aforesaid," the defendant entered, ejected the plaintiff, and unjustly withholds the possession, etc. This clearly indicates that the plaintiff intended to aver, and understood that he had averred, title in himself, in fee; and reading both averments together, whatever doubt may have

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arisen on account of the use of the word *claims* is cleared up, and the language must be construed to amount to an averment of title in the premises in fee simple absolute. The rule requiring the pleading to be most strongly construed against the pleader, does not require such a construction to be given (if it will reasonably bear a different one) as will make the pleading absurd. Such would be the case if the plaintiff should be held to have averred that he asked, [192] sought for, or demanded the title in fee. *It may be doubted whether the rule of the common law invoked by counsel has any application to a case like the present. (See sec. 70 Pr. Act; Nevada Co. & Sac. Canal Co. *v.* Kidd, 28 Cal. 683.) That the defendant in that case understood it as an averment of title, is apparent from the fact that no objection was interposed to the count on that ground, which would doubtless have been done, had they understood the averment as they now do; for if that is not an averment of title in fee, there is nothing in that count showing that the plaintiff was still entitled to the possession. An examination of the opinion of this Court in that case, as reported in 9 Cal. 365, clearly shows that the Court understood the complaint to tender issue upon title; and though the point before us was not presented or expressly decided in that case, such must have been the construction of that allegation, for the whole decision goes upon the question of title.

The second count, though it clearly presents the issue of title in fee to the undivided third of the premises, need not be noticed, for both in the District Court and this Court the contest was confined to title to the whole premises.

In our opinion, the title of the plaintiff in that suit was expressly put in issue by the pleadings.

The other and more important branch of the question is, was the title of the defendants in that action also at issue?

No light is thrown on this question by the answers in that case, which consist of general denials and the averment of title and the right of possession in themselves—the latter being, as we have said, a general denial in an argumentive form. The averment, when stated according to its logical effect, is "the plaintiff is not the owner or entitled to the possession,

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because the defendant is the owner and entitled to the possession."

The findings in that case contain matters of evidence, facts in controversy, and facts in issue. It may be admitted without hesitation that it is impossible, under the very general system of pleading adopted and repeatedly recognized as sufficient in this State, in the action of ejectment, to draw the line with accuracy between facts in controversy and facts in *issue. It may be stated generally that the [193] ultimate facts upon which the recovery is had—facts which if found the other way the recovery must have been different—are facts in issue. Thus in Hardy v. Johnson, 1 Wall. 371, the recovery was based on the facts that the plaintiff was the owner of one undivided twentieth of the premises, and that the defendant was in possession without title. All the facts established by the plaintiff going to support his alleged title were probative facts, which if disputed by the defendant, were facts in controversy; and the ultimate fact in proof of which the probative facts were offered, was title in the plaintiff, and that was a fact in issue. In the former action, the District Court did not directly find title in either party, but among the conclusions of law it is stated that the plaintiff (McMillan) was not on the day named, or afterward, the owner in fee simple absolute or otherwise, of the premises. That matter should have had its place among the findings of fact, and not the conclusions of law, for if title in fee or otherwise is a fact that may properly be alleged in the complaint, it is an ultimate fact that should be found by the Court. The findings show that McMillan had acquired the legal title from Randall, subject to Cary's judgment of foreclosure, and the sale made under it; that McMillan attempted to redeem from that sale; and that, in pursuance of the sale, the Sheriff conveyed the premises to Hyatt, and that Hyatt conveyed the premises to Richards and others, under whom the present plaintiff claims. The contest, as appears from the findings, was narrowed down to a point in respect to the redemption, and as that should be determined, so must the title. If the redemption was in fact made, the Sheriff's deed to Hyatt was void; but if the proceedings to effect the redemp-

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tion were not sufficient, then the deed to Hyatt took the legal title formerly conveyed to McMillan. The District Court found that McMillan had not effected a redemption. Hyatt's deed was therefore valid, and his vendees had judgment.

On appeal, this Court held that the findings showed [194] that the redemption had been made, and *therefore Hyatt's deed was unauthorized and void, and judgment was ordered against Hyatt's vendees. The evidence reported in the findings, the facts in controversy and the facts in issue, all unmistakably point to an issue between the adversary titles claimed by the respective parties.

The same conclusion is reached when the question is looked at from another point of view. The object of the action of ejectment, so far as the form of the recovery alone indicates it, is to recover the possession of premises which the defendant unlawfully withheld from the plaintiff. The judgment for the plaintiff determines that he was entitled to the possession, at the commencement of the action and the rendition of the judgment. (Yount *v.* Howell, 14 Cal. 465; Calderwood *v.* Brooks, 28 Id. 151; Hardy *v.* Johnson, 1 Wall. 371.) The *gravamen* of the action is the wrongful withholding of the possession. An ouster is usually distinctly alleged, but it is not necessary, for the wrongful withholding is an ouster, and none other need be proven. But although the direct result of a recovery is only a restitution of the possession, the action is still, like ejectment at common law, a suit for the trial of disputed titles to lands. The judgment proceeds on the sole ground that the plaintiff, when he recovers, is entitled to the possession as against the defendant; and when the judgment is for the defendant, in case he is found to be in possession, and the action is determined on its merits, it is given on the ground that he is entitled to the possession as against the plaintiff. It is the right to the possession as between the parties that is tried, and that fact, when ascertained, determines how the recovery shall be. This right to the possession is title—"the means whereby the owner of lands hath the just possession of his property." (Co. Litt. 345; 2 Black. Com. 195.) The actual title, it is true, may not be in either litigant. The plaintiff may rely upon the

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title presumed from the fact of prior possession, and the defendant in possession may rely safely upon the legal presumption of title until the true title or prior possession is shown to be in the plaintiff. But whether the title exists in presumption or is produced in fact, *it is the title that [195] prevails in the action. The Court adjudges that the plaintiff is entitled to the possession of the premises, when it appears that his title is better than that held by the defendant, by presumption or in fact. The party who recovers, after a trial on the merits, is successful in the action, because his is the better title. We do not undertake to say that the parties may not by their pleading, or in some other manner, limit the issues to a particular title; but when the plaintiff alleges that he is the owner in fee and entitled to the possession—under which of course he may prove a less estate—and it is adjudged that he recover the possession, the judgment is conclusive that his right to the possession—his title—is better than that held by the defendant. If the title of each party was not put in issue and determined in such case, it would be difficult, if not impossible, to say what was in issue.

The reports of this and other States, in which the actions in ejectment are abolished, are replete with cases deciding what evidence of title is or is not sufficient to maintain the action, and what title the defendant may show to defeat the recovery. It would be absurd to require, as has been repeatedly done, the defendant to set up in a supplementary answer in the nature of a plea *puis darrein continuance*, a title acquired by him after issue joined, if his title was not drawn in issue. In Vance *v.* Olinger, 27 Cal. 358, the pendency of a former action by the same plaintiff against the same defendant, and for the possession of the same premises, was set up by the defendant, and it was held that the answer did not constitute a defence, because it did not also appear that the same title was in issue. In Wattson *v.* Dowling, 26 Cal. 125, it was considered that a purchaser from the defendant, pending the action of ejectment, was bound by the judgment as an instrument of evidence, to the same extent that the grantor would have been, had not the conveyance been made. This

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result could accrue only in consequence of the defendant's title having been in issue.

It must be admitted by every one that the recovery operates as an estoppel to this extent, to preclude the losing *party from denying that as to him, the prevailing party was, at the time of the rendition of the judgment, entitled to the possession. It would seem necessarily to follow that in order to avoid the estoppel, the losing party must show some other right of possession than that which he had when the estoppel was created. He is bound to show such other right, because his former claim of right was determined by the recovery.

[196]

The plaintiff, while contending that a judgment for the plaintiff is only conclusive that on the day of the commencement of the action he had the right of possession, does not deny that when the plaintiff's title is put in issue by the averments of the complaint, the recovery is conclusive of that issue, and may be relied upon as an estoppel in a subsequent action between the parties for the same premises. The averment of title we alluded to is such as is usually found in the complaint—the general allegation that the plaintiff is the owner, the owner in fee, or the like. If the trial is upon the merits, and the defendant in possession recovers, the recovery as an estoppel, works a complete extinguishment of the plaintiff's title. Is it not possible for the defendant's title also to be brought in issue, so that the adjudication, whether in its favor or against it, may also be pleaded or offered in evidence as an estoppel? We have seen that the allegation of the defendant, that he is seized in fee, is no more or better than a general denial, and if his title—whatever it may be, so only it is a legal title—is not in issue under the denial, it will be necessary for him also to sue, notwithstanding he has just recovered judgment, if he desires an adjudication upon the question of *his title*. Concede, for the sake of argument, that the defendant's title is not drawn in issue under the general denial, and suppose the plaintiff recovers, and that the defendant, not desiring to produce his evidence at that trial, sues the plaintiff in the former action and recovers. Each party then

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has the benefit of an estoppel in support of his own title—that is, an estoppel conclusive that the title is valid and sufficient when considered by itself, but not that it is valid when set in opposition to the title of his adversary. The process *might be repeated *ad infinitum* with the same [197] results. In tracing out such estoppels to their legitimate consequences, under the familiar rules that estoppels ought to be mutual, estoppel against estoppel, setteth the matter at large, etc., we might agree with Lord Coke that they are a "curious," but not that they are also an "excellent sort of learning." The truth is, there is but one title between the parties to the action to recover the possession of the premises, though there may be many evidences of title. It is impossible that two persons claiming adversely to each other can at the same time hold such right or title in the premises as will entitle each as against the other to the possession. Each party to a contested action claims the title, out of which the right of possession springs, and the Court determines which of the two holds it. That is the matter which is adjudicated.

In McMillan *v.* Richards, the defendants were in possession, and from that fact they were presumed to hold the title, and in addition thereto, they showed a claim of title, apparently regular, from Osio. The plaintiff, in order to succeed, was bound to break the chain, and this he attempted to do by showing a redemption before the execution of the Sheriff's deed under which the defendant claimed. As that fact should be determined, so must the title. The fact was important only as it related to title. It did not directly touch the possession. This Court determined that the redemption was sufficient, and consequently the plaintiff's claim of title was valid and that of the defendants invalid, and the possession was ordered to be delivered to the party in whom was the title. The determination had a necessary bearing upon the defendant's title. and in holding that the redemption left the title in the plaintiff, it necessarily resulted that it did not pass to the defendants. The doctrine expressed in Caperton *v.* Schmidt, that "the estoppel of the verdict and judgment is necessarily limited to the rights of the parties as they exist

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at the time when such verdict and judgment are rendered, and cannot preclude either party from showing that their rights have been varied or extinguished at a subse-
[198] quent period," *would necessarily imply that whatever rights they severally possessed at the time to which the verdict and judgment relate, (unless the issues were limited by the pleadings, by stipulation or otherwise,) were settled by the recovery.

No sufficient reason, in our opinion, is given why the matters that have once been judicially determined in the action of ejectment may be again drawn in question between the same parties, when they could not in an action of another character. In ejectment as in other actions, the parties rely strictly upon their rights in the matter in litigation. No argument can be drawn from the fact that the judgment is not that the plaintiff recover the title, but only the possession, for a similar result accrues in the action of replevin, though the title to the personal property is confessedly in issue. In trespass to lands, whatever may be the form of the issues, the recovery is only of damages, and yet, as in Outram *v.* Morewood, 3 East, 346, the losing party is estopped in another action from averring contrary to the title as found in the former suit. (See cases cited in note to Duchess of Kingston's Case, 2 Smith Lead. Cas.)

The plaintiff contends that neither the deraignment of title, nor the redemption by McMillan, nor his payment for that purpose, were in issue, but came only collaterally in controversy. For what purpose were they drawn in controversy? They would not of themselves show who was entitled to the possession, and would not have any direct bearing on that issue, and were only important as they tended to prove title, from which alone the right to the possession was deduced.

We are of the opinion that the third answer is sufficient in law, and that the former recovery and the issues found in that action estop the plaintiff in this action.

The offer to show that the redemption was not in fact made was properly rejected, for if the proof had been made it would have shown that the judgment of this Court on the former appeal was improper and erroneous, and have thus directly

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overthrown the estoppel. The District Court will not assume the authority to revise the judgment of the Supreme Court. *The door was not open for the introduction [199] of the proposed proof, in consequence of the production by the defendants of the redemption deed, for they did not thereby go behind the estoppel set up by them, but they claimed that by virtue of the recovery and as a consequence of the adjudication of this Court, they were entitled to the deed.

The object of the suit of Shafter *v.* Reynolds was to set aside a certain deed in the hands of Elizabeth Reynolds, as a cloud upon the title of the plaintiffs in that action. It does not appear from the record in that case that the title now claimed by the present plaintiff was involved in the action. (Hamm *v.* Arnold, 23 Cal. 373; Hager *v.* Schindler, 29 Id. 57.) And if it can be said that it was actually or necessarily in issue, it would be difficult to see how the adjudication could have been in their favor, for it must have been found that the plaintiffs in that action held the title, otherwise there would have been no basis for the judgment that the deed to Elizabeth Reynolds was null and void, and that she convey to the plaintiffs all the claim of title she derived through that deed. The Court could not have granted the plaintiffs any relief against the deed had it been found that title was in any of the defendants.

Judgment affirmed.

SAWYER, J., concurring:

I am satisfied that the title was directly in issue and determined, and not merely collaterally litigated in McMillan *v.* Richards. Title was a fact in issue as distinguished from a fact in controversy within the principles of the case of Caperton *v.* Schmidt, 26 Cal. 494. The plaintiff alleges in his complaint that on a certain day "he was possessed of" the lands in controversy, "with the appurtenances, * * * which said premises the said plaintiff claims in fee simple absolute. And the said plaintiff, being so possessed thereof, and being so the owner thereof, as aforesaid, the said defendants afterwards" entered into said premises and ejected plaintiff. This

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[200] is, at *least, as clearly an allegation of title as that contained in the statutory form of a petition in an action for the recovery of land in Georgia, which is: "The petition of A. B. showeth that C. D. is in possession of a certain tract of land in said county, (here describe the land,) to which your petitioner claims title," etc. This is the only allegation of title, yet the determination of title upon a petition of this kind was held conclusive in a subsequent action between the same parties to recover the same land. (Caperton *v.* Schmidt, 26 Cal. 507; Sims *v.* Smith, 19 Geo. 124.) In McMillan *v.* Richards, the defendants also not merely took issue on the allegations of the complaint, but affirmatively set up title in themselves. Thus, both parties claimed title, and title was the ultimate fact in issue, and actually and directly litigated and necessarily determined. The parties and the Court acted throughout upon the theory that issue was directly taken upon title—that it was the real issue in the case. In the present action, the plaintiff put in precisely the same evidence of title that the defendants relied on to establish their title in McMillan *v.* Richards, and no other. The parties in the present action are in privity with the parties to McMillan *v.* Richards, and no new title or change in the circumstances since the trial of that action is shown. The Court has found the title to be the same, and I think the plaintiff is clearly estopped from again litigating it. The matter of estoppel is sufficiently pleaded. I see no error in the record, and therefore concur in the judgment of affirmance.

Mr. Justice SHAFTER did not participate in the trial or decision.

THE PEOPLE *v.* THOMAS A. SCOTT AND THOMAS McCORMICK.

TESTIMONY ON TRIAL FOR ARSON.—On a trial for arson, charged to have been committed by burning a building owned by a person named and in which he was residing, if no question is made by the defendant as to the right of such person to the possession of the land on which the building stood, testimony as to its ownership is irrelevant.

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*APPEAL from the County Court, city and county of [201] San Francisco.

The defendants appealed.

The other facts are stated in the opinion of the Court.

George W. Tyler, for Appellants.

Attorney-General, for the People.

By the Court, CURREY, C. J.:

The defendants were indicted with others for the crime of arson in the second degree, charged to have been committed in the daytime on the 16th of September, 1865, at the city and county of San Francisco. To the indictment they pleaded not guilty. They were convicted on the trial and each sentenced to the State Prison for two years.

The indictment set forth that the building burned by the defendants and others was the dwelling house of one Bartel B. Newman, in his occupation and possession when it was set on fire. There was testimony given on the trial to the effect that at the time the house was destroyed it belonged to Newman, who was then residing therein. Newman, who was sworn as a witness for the people, testified on cross-examination that he bought eighty acres of the tract of land on which the house was situated of one Michael Cain. The counsel for the defendants then asked the witness the following question: "Do you know of a decision of the Supreme Court in the case of Coryell *v.* Cain, 16 Cal. 567, in reference to that land purchased by you as aforesaid?" The witness answered in substance that he had seen the papers in that case and read the title of the suit, but not the contents of the papers. The defendants' counsel then asked the witness to mention the papers which he had so seen. The District Attorney thereupon objected to the question, and the objection was sustained on the ground that the testimony sought was irrelevant, to which ruling the *defendants' counsel excepted. This [202] decision of the Court is the only ground of error assigned on defendants' behalf.

The record does not show, as the defendants' counsel seems

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to think, that there was any question upon the trial as to Newman's right to the possession of the land on which the house stood, even if the question of title and right of possession could be deemed and held of any force or relevancy in the case on trial, in any event. As the case stands upon the record before us, we must hold, with the Judge of the Court below, that the evidence sought to be obtained was irrelevant.

Judgment affirmed.

RACHEL BONDS *v.* L. M. HICKMAN.[1]

PATENT FOR LAND.—A patent for land, issued by the United States to "James Smith, administrator of Robert Smith, deceased," vests the legal title to the land in James Smith, and said James Smith's conveyance of the same transfers the legal title to his grantee, though it does not state that it is made as administrator.

APPEAL from the District Court, Thirteenth Judicial District, Stanislaus county.

The deed from James Smith to the plaintiff was in the usual form of deeds of bargain and sale, and contained no recitation or declaration that Smith held the title or conveyed it as administrator or trustee. Defendant objected to its reception in evidence because the plaintiff had shown no order or authority from the Probate Court to sell the land or execute any conveyance therefor, and because she had shown no settlement of the estate of Robert Smith, deceased. Plaintiff appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The grantee in the patent is James Smith. The words "administrator of the estate of Robert Smith, deceased," are not words of qualification or limitation of the estate, [203] but *merely words that help to identify and to designate the person. (Taft *v.* Brewster, 9 John. 332; and Hills *v.* Bannister, 8 Cow. 33.)

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[1] Same case, 29 Cal. 460.

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H. P. Barber, for Respondent.

Counsel for appellant contends that the words "administrator of the estate of Robert Smith, deceased," are mere *descriptio personæ*. If that be so the patent itself was inadmissible. I construe the patent as vesting the title in James Smith, as administrator of Robert Smith, and for the benefit of the heirs of Robert Smith. Plaintiff should have shown an order from the Probate Court for the sale of the property.

By the Court, CURREY, C. J.:

The defendant obtained a patent from this State in May, 1862, purporting to grant him the parcel of land concerning which this action was instituted. In November of the same year, one James Smith, the plaintiff's grantor, obtained a patent for the same land from the Government of the United States. The patent so issued is claimed to be founded on a preëmption claim of one Robert Smith, which had its inception long before the defendant instituted proceedings to obtain title to the same land under the laws of this State. The plaintiff claims that the patent was issued to James Smith as the successor by inheritance, or as the personal or legal representative of Robert Smith, who died several years before the patent from the Government of the United States was issued. From the plaintiff's complaint, it appears that after defendant obtained his patent, he commenced an action against the plaintiff to recover possession of the land in question, and recovered judgment therefor, and that a motion for a new trial was pending and undetermined therein when this action was commenced. The object of this action was to obtain a decree annulling and vacating the patent issued to Hickman, the defendant, and to enjoin said Hickman from further proceeding with his action *against [204] Mrs. Bonds; and for such further and other relief as might be just and equitable.

The pleadings in the case are extremely loose and unsatisfactory; but no objection has been made to them by counsel for either party, and if objection on this account were now made for the first time we should not feel disposed to criticise

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the pleadings severely, inasmuch as this case has been in this Court before, on which occasion the pleadings passed without challenge either by counsel or Court.

On the trial, the plaintiff, to maintain the issue on his part, introduced in evidence the patent issued to James Smith, which was admitted; and then offered in evidence a deed of bargain and sale of the land in controversy from said James Smith to the plaintiff, duly executed and acknowledged. The defendant objected to admitting this deed in evidence, and the Court sustained the objection, to which decision the plaintiff excepted, and then rested. Thereupon the defendant moved the Court to dismiss the complaint, on the ground that the plaintiff had not introduced any evidence in support of her action. This motion was granted, and judgment final was thereupon entered for the defendant.

In this case, to be found in 29 Cal. 461, we held the patent issued to James Smith competent evidence, and it follows as a matter of course that if that patent was proper evidence of the transmission of the title from the Government to the patentee, the deed from him to the plaintiff was competent evidence to show that the plaintiff had acquired the title granted by the patent to James Smith.

The defendant objects that it does not appear that the deed from James Smith to the plaintiff was made by him as the administrator of Robert Smith, deceased. The patent was to "James Smith, administrator of Robert Smith, deceased." The title, which passed by reason of the patent and the proceedings on which it was founded, vested in James Smith, the patentee named. Whether he held it in trust for others we are not informed by the case before us, and we are not aware that it could in any event be a proper subject of inquiry [205] in *this action. We are of the opinion that the Court erred in excluding the deed from James Smith to the plaintiff, and for that reason the judgment should be reversed and a new trial granted.

Judgment reversed, and new trial ordered.

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GEORGE STORY v. HENRY ROBINSON et als.

DAMAGES FOR A TRESPASS.—One who commits a trespass by turning the cattle of another out of an inclosure on to the public lands, cannot be made liable to the owner for the loss of the cattle caused by starvation for want of grass after they have thus been turned out of the inclosure, if the owner has been notified to take care of them.

IDEM.—A party committing a trespass can be made liable for such damages only as are the proximate result of the trespass.

APPEAL from the District Court, Third Judicial District, Santa Clara county.

The defendants claimed to be in possession of a tract of mountain land which they used for grazing. It was public land, and was not entirely inclosed. There was, however, a fence across its north end, with a barway in it for ingress and egress in that direction. The defendants had a house on this tract of land, in which they resided, and in May, 1864, were pasturing four or five hundred head of cattle on the same. The plaintiff at that time was herding and grazing one hundred and eighty head of cattle among the hills near the land claimed by defendants. The grazing having become poor, the plaintiff, without the knowledge of defendants, drove his cattle through the barway of the defendants' fence, and commenced grazing them there, and also made arrangements for building a corral and house. The defendants discovered the plaintiff after he had been there about two weeks, and ordered him to take his cattle away, but he refused. The defendants then drove the cattle through the barway off from the land claimed by them. The plaintiff drove the cattle back at night, and the defendants drove them away again the next day. This *was repeated four or five times between the 25th [206] of May and 15th of June, 1864. The plaintiff then ceased to drive the cattle back, and they roamed about on a neighboring tract of land claimed by one Gregory, for about a month. Three weeks after the cattle had been on Gregory's claim, he notified plaintiff to come and take them away. The plaintiff promised to do so, but said he did not know what to do with them, but did not take them away, and they wandered off among the hills, and were not driven together again until

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November following, when about ninety head of them were found to have died of starvation.

The other facts are stated in the opinion of the Court.

S. O. Houghton, for Appellant.

The Court finds as a conclusion of law that the loss of the cattle did not result from the acts of the defendants. It needs no citation of authority to show that if one commits a trespass by passing over the land of another, the other is not entitled to pursue him upon other lands and trespass upon his rights so as to deprive him of his property. The deduction of the Court that the loss of plaintiff's cattle did not result from the acts of defendants is erroneous. Their loss was the direct consequenc of the act of defendants.

Peckham & Payne, for Respondents.

The finding of facts shows that the cattle died from natural causes, and not from any act of the defendants.

By the Court, CURREY, C. J.:

The complaint charges the defendants with taking and detaining from the possession of the plaintiff one hundred and eighty head of neat cattle, the property of the plaintiff, of the value of five thousand four hundred dollars, by reason whereof the plaintiff sustained damage in the sum of six thousand dollars. The defendants by answer deny each and every
[207] *allegation of the complaint, and further answering they allege that certain of the defendants found trespassing upon lands belonging to them and one Doty, fifty-one head of plaintiff's cattle, which they and Doty drove from said land and left immediately beyond the border thereof.

The cause was tried by the Court without a jury, and a judgment rendered for defendants. This judgment, the plaintiff maintains, was not a just legal result from the facts found, and having failed on motion to induce the Court to render judgment on the findings of fact in the plaintiff's favor he has appealed to this Court for the purpose of securing the object for which he brought his action.

The defendants' right to the possession of the premises from

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which they drove the plaintiff's cattle is the point controverted most by the plaintiff's counsel. It seems the plaintiff drove the cattle upon the premises claimed by the defendants through a barway in the fence, which the defendants had erected as one of the boundary lines of the land, and it was through the same barway the cattle were turned off the premises. It is not necessary to decide the case as depending upon the defendants' right to the exclusive possession of the land, because it sufficiently appears from the finding of the facts by the Court that the loss of which the plaintiff complains was not the proximate result of the acts of the defendants. After the cattle were driven from the premises, they roamed around on a neighboring tract of land claimed by one Gregory, where they remained about a month. While they were there, Gregory requested the plaintiff to take them away, which he promised he would do, but he neglected to do so. After that, the cattle wandered away among the hills, and in the course of the summer and autumn, one half of the herd, consisting of one hundred and eighty head, died of starvation.

We do not see how upon the facts found the defendants can be made liable for the cattle which were lost by starvation. The plaintiff was in duty bound to take care of his cattle and save them from starving to death, if it could be done, after they were turned off the premises. He could not, upon any *principle of law or justice, refuse all care [208] of his cattle from that time, and then, upon their perishing by his neglect or otherwise, be entitled to a recovery of their value of the defendants for turning them out of the premises claimed by them, even were it determined that they were guilty of a trespass in so doing, because it does not appear that the loss of the cattle was in consequence of the acts done by the defendants.

Judgment affirmed.

Mr. Justice RHODES did not express any opinion.

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EDMOND BROOKS v. W. J. DOUGLASS, ELIZABETH DOUGLASS, HIS WIFE, ROBERT C. BROOKS, AND DAVID CALDERWOOD, INTERVENOR.[1]

TRIAL AFTER CHANGE OF VENUE.—If the defendant procures a change of venue, the plaintiff may pay the costs and transmit the papers to the county fixed as the place of trial, and have the case placed on the calendar and tried.

NEW TRIAL ON GROUND OF SURPRISE.—In order to sustain a motion for a new trial on the ground of surprise, the moving party must show not only surprise, but that he is injured by it; and this he must do by showing what case he can establish in the event of a new trial.

ISSUES OF LAW AND FACT.—When there is both a demurrer and an answer to the same complaint, raising both an issue of law and fact, the issue of law should first be disposed of.

[2] IDEM.—When there are both issues of law and fact joined in the same cause, and the cause is tried on the issues of fact and a judgment rendered, the presumption will be indulged, on appeal, that the issue of law had first been disposed of.

DEMURRER AND ANSWER.—An issue of law and fact should not be mixed in an answer. A demurrer should be filed as a separate pleading.

APPEAL from the District Court, Third Judicial District, Alameda county.

The facts are stated in the opinion of the Court.

A. Williams, for Appellants Douglass and wife, and *D. Calderwood*, in *pro per.*,

Argued that there were issues of both law and fact to [209] the complaint, and that the issue of law should *have been first tried; and cited Pr. Act, sec. 155, and Hester's Adm'r *v.* Clements et al., 21 Cal. 425.

Daniel Rogers, for Respondent.

The appeal, as to the demurrer, must be determined on the judgment roll. What is called a demurrer by appellant was an answer. There was no issue of law.

By the Court, CURREY, C. J.:

This action was brought in the District Court of the Twelfth Judicial District, in and for the city and county of San Francisco, by the plaintiff in possession by his tenant of certain real

[1] Approved, same case, 38 Cal. 671.
[2] Cited, McCarthy *v.* Yale, 39 Cal. 586.

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property in said city and county, against the defendants, who claimed some estate or interest in the property adverse to him, for the purpose of determining such adverse claim, estate, or interest. Before Douglass and wife appeared in answer to the summons in the case, David Calderwood petitioned to be allowed to intervene by uniting with them in defence, on the ground that he had contracted to purchase of them an undivided half of their interest in the premises for a certain consideration, a part of which he had paid. This petition was granted, and thereupon Douglass and wife and Calderwood united in an answer traversing the material allegations of the complaint, and also pleading some affirmative matters in bar of plaintiff's right to maintain the action. Some time after this, on their application, the place of trial was changed to the District Court of the Third Judicial District, in and for the county of Alameda, in which latter district and county the cause was brought on for trial by the plaintiff in the absence of the defendants. The cause was submitted to the Court upon the pleadings and evidence produced by the plaintiff. Whereupon a judgment and decree was rendered for the plaintiff in accordance with the prayer of the complaint. After this, Douglass and wife and Calderwood gave notice of their intention to move for a new trial, on the grounds: First, Of *surprise, against which ordinary prudence could [210] not have guarded. Second, Of the insufficiency of the evidence to justify the decision of the Court; and Third, That such decision was against law.

The motion being denied, Douglass and wife and Calderwood appealed.

I. The matters of surprise specified were alleged to be, in the first place, that the pleadings and proceedings in the cause were transmitted from the Court in which the action was commenced to the District Court in and for Alameda county by the procurement of the plaintiff's attorney after the order changing the place of trial was made; and, in the second place, that the testimony of a witness for the plaintiff as to the nature of the plaintiff's possession of the premises was not true, by reason whereof the defendants were taken by surprise.

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The appellants claim that by the rules and practice of the District Court the party moving the change of venue was the party to pay the costs and have the cause duly transferred and placed on the calendar of the Court to which it was ordered transferred for trial, on written notice to the opposite party, and that if the appellants failed to pay the costs of transfer and to have the pleadings and proceedings in the cause transferred as ordered, the plaintiff's remedy was to move the Court on affidavit, showing the laches of the appellants, and thereon obtain an order vacating the order changing the venue.

We are not advised, by the transcript of the record, of any such rules or practice. We cannot presume the existence of any particular rules or practice of the District Court in such cases. The appellants claim a positive benefit from their own premeditated laches, as appears by the affidavit of Calderwood submitted on the motion for a new trial. Calderwood deposed that some time after the order of transfer was made, the plaintiff's attorney gave him verbal notice requesting him and his co-defendants, Douglass and wife, to pay the costs of the transfer of the cause, when he stated to [211] the plaintiff "that neither *the defendants nor the intervenor would pay the costs of transfer unless compelled to." We are not aware of any law or rule of Court preventing the plaintiff in such a case from doing what was necessary to carry into effect the order directing the transfer of the cause to the District Court in and for Alameda county for trial. We should be surprised, indeed, to discover the existence of any such law or rule, and as the appellants have not referred us to any, we shall presume none exist.

It appears from the affidavit of the attorney for Douglass and wife that the plaintiffs told him some time before the cause was tried that it would be tried at the approaching June term of the District Court in and for Alameda county, but the defendant's attorney says he did not know what the plaintiff's attorney meant, as he was not aware at the time that the order transferring the cause for trial had been made. The attorney for plaintiff deposed that he told Calderwood on several occasions that the plaintiff was determined to have the cause tried

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at said June term; also, that some two weeks before the cause was tried, he asked the defendants' attorney if he intended trying the cause for the defendants, informing him at the same time that he had ordered the papers in the case to be sent to the District Court for Alameda county, and that the cause would be upon the calendar for the June term, and would be tried during such term. To which the defendants' attorney replied that he had not been paid, or if not paid he would not try the cause.

The appellants say they were surprised by the testimony given upon the trial, on the ground that the same as to the nature of the plaintiff's possession of the premises in controversy was false testimony. The affidavits on which the motion for a new trial was made do not sustain the allegation that such testimony was false.

There is nothing stated in the affidavits on which the allegation of surprise against which ordinary prudence could not have guarded, can find support. In order to sustain a motion for a new trial on the ground of surprise, the moving party must *show not only a surprise, but that [212] he is injured by it; and this he must do by showing what case he can establish in the event of a new trial. (Patterson *v.* Ely, 19 Cal. 35, 36; Blake *v.* Howe, 1 Aik. 310; Taylor *v.* California Stage Company, 6 Cal. 228; Schellhous *v.* Ball, 29 Cal. 605.)

II. The decision and judgment was alleged to be against law, because a certain issue of law presented by the pleadings was not disposed of before the trial of the action upon the issue of fact joined.

The answer of Douglass and wife and Calderwood commenced as follows: "The above named defendants for answer to the complaint filed herein allege as follows: That the said complaint does not state facts sufficient to constitute a cause of action, this being a suit for an injunction, inasmuch that plaintiff has not alleged in his complaint that he has exhausted all remedy at law, or that he is without remedy at law."

Where there are issues both of law and fact to the same complaint, the issue of law shall first be disposed of. So the

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statute provides. (Pr. Act, sec. 155.) When there are both issues of law and fact, and the cause is brought on to trial and the issues of fact are tried and a judgment rendered in the cause, the presumption will be indulged that the issue of law was disposed of previously by an order overruling the demurrer, or that the demurrer had been waived or withdrawn. The demurrer that the complaint does not state facts sufficient to constitute a cause of action, was called by the defendants an answer, and though it may, for aught that appears, have been allowed by them to sleep undisturbed in its misplaced position, we shall not presume the Court omitted to dispose of it in its proper order, unless it was in effect waived or withdrawn from the record. Nor should we be inclined to disturb the judgment, even were it made to appear that the Court omitted to pass directly upon the question of law suggested by the portion of the answer above quoted. If a defendant wishes to obtain a decision of the Court upon a question of law arising upon the face of the complaint, in advance of the trial of the cause, upon an issue of [213] fact joined, the proper *practice is to do so by a demurrer in terms as a distinct pleading. The practice of mixing matters of law and fact in the same pleading is not to be commended, and should be discountenanced by all engaged in the administration of justice.

Judgment affirmed.

THE PEOPLE v. PHILIP DICK.[1]

REVIEW OF INSTRUCTIONS GIVEN BY COURT BELOW.—If the defendant in a criminal case seeks a reversal of the judgment on the ground of error in giving or refusing instructions, the record must contain sufficient of the facts of the case to show the pertinency of the instructions given or refused, or the appellate Court will not review the action of the Court below.

IDEM.—If the Court in its instructions assumes a certain state of facts as proved, which show the applicability of instructions given or refused, the appellate Court may review the action of the Court in giving or refusing them, without any of the evidence being embodied in the record.

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[1] Same case, 37 Cal. 277.

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[1] IDEM.—If the action of the Court below in giving or refusing instructions is erroneous under any possible state of facts, the appellate Court will review it, notwithstanding the evidence is not in the record.

[2] CONVICTION ON CIRCUMSTANTIAL TESTIMONY.—In order to convict a defendant of a crime upon circumstantial testimony alone, the circumstances proved must all concur to show that he committed the crime, and must all be inconsistent with any other rational conclusion, and must exclude to a moral certainty every other hypothesis but the single one of guilt.

CHARGE OF COURT AS TO FACTS.—It is better for the Court in charging the jury in a criminal case, to avoid assuming any material fact as proved, however clear to the mind of the Court such fact may seem to be established.

JURY JUDGES OF FACTS.—It is the province of the jury, unaided by the Court, to say whether a fact is proved or otherwise.

APPEAL from the District Court, Fifth Judicial District, San Joaquin county.

The defendant appealed.

The other facts are stated in the opinion of the Court.

Frank T. Baldwin, *T. A. Coldwell*, and *John C. Byers*, for Appellant.

The Court should have given the instructions asked by the defendant; for although some of them are partially given by the Court in its general charge to the jury, yet owing to the great length thereof and the equivocal language in which *couched, the jury are very liable to misappre- [214] hend its true meaning, and the defendant's rights be prejudiced thereby. (Cr. Pr. Act, sec. 400; People *v.* Ramirez, 13 Cal. 172; People *v.* Williams, 17 Id. 148; People *v.* Ybarra, 17 Id. 171; People *v.* Levison, 16 Id. 99, 100; People *v.* King, 27 Id. 515; People *v.* Strong, 30 Id. 151; People *v.* Shuler, 28 Id. 490; 1 Greenl. on Ev. sec. 34; 3 Id. sec. 137, and note 3; 1 Starkie on Ev. 482, 483, 510; Burrill on Cir. Ev. 181, 182.)

Attorney-General, for the People.

The presumption is that the Court below charged in accordance with the law. (People *v.* Jocelyn, 29 Cal. 563; People *v.* King, 27 Id. 514.) The record does not contain the evi-

[1] Cited, S. C. 34 Cal. 665.
[2] Cited, People v. Murray, 41 Cal. 67.

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dence, and without it it will be presumed that the charge related to the case. (People *v.* Levison, 16 Cal. 99; People *v.* Barry, 31 Id. 357.) The charge refused had already been given in substance by the Court. The defendant therefore sustained no injury.

By the Court, CURREY, C. J.:

The defendant was indicted for the murder of S. M. Simpson, alleged to have been committed on the 12th of May, 1866, at the county of San Joaquin. The accused was tried and found guilty of murder in the first degree, and thereupon sentenced to be executed.

The transcript of the record contains no portion of the evidence given at the trial. The only alleged errors of which we can take notice arise from the charge of the Judge to the jury, and the refusal by the Court to give certain instructions which counsel requested on behalf of the defendant.

The party who asks for a reversal of a judgment on the ground of errors committed upon the trial must show in what the errors consist, for this Court will not, as has been said, presume error unless the facts from which such a presumption can fairly be deduced are disclosed by the record. But [215] it is *not in all cases necessary, in order to ascertain that a fatal error has been committed, that the evidence should be before the Court of review. If the action of the Court of which complaint is made be manifestly erroneous under any and every conceivable state of facts, or under the facts and circumstances of the case as they seem to have been assumed by the Court that tried the cause, this Court will not hesitate to review such action, notwithstanding the evidence may not be brought before us. (People *v.* Levison, 16 Cal. 98; People *v.* King, 27 Id. 514.)

The Court, in charging the jury, assumed that the evidence implicating or tending to implicate the defendant in the crime of which he was accused, was of a circumstantial kind, and elaborated the subject of circumstantial evidence at great length before the jury. The instructions which the defendant's counsel requested the Court to give to the jury were predicated of facts and circumstances which seem to have

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been proved, and which it was claimed on the part of the people warranted the jury in finding the defendant guilty of the murder of Simpson, while on the part of the defendant it was maintained that the circumstances in proof must not only all concur to show that the accused committed the crime, but that they were inconsistent with any other rational conclusion. We are therefore to assume from what the record contains that the evidence produced against the defendant was of facts and circumstances, from which it was the province of the jury to deduce the proper conclusion, and that the charge of the Court relates legitimately to the case as it stood upon the evidence before the jury. (People *v.* Barry, 31 Cal. 357.)

After the jury had been charged at length, the defendant's counsel requested the Court to instruct them, "that in order to convict the defendant upon the evidence of circumstances, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they are all inconsistent with any other rational conclusion." And, also, in these words: "It is not sufficient that the circumstances proved coincide with, account for, and therefore render *probable the hypothesis sought to be estab- [216] lished by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty." These requested instructions, with others, the Court refused to submit to the jury, and to the denial of the defendant's request his counsel duly excepted.

There is no doubt respecting the soundness of the legal propositions contained in the two instructions above set forth, nor of their pertinency to the case before the jury. (8 Greenl. Ev., sec. 137; Burrill on Cir. Ev. 181, 182; 1 Starkie Ev. 482, 483.) But the action of the Court is sought to be justified on the ground that the import of these requested instructions was contained in the general charge of the Court, and that as the jury was correctly instructed in the law of these requested and rejected instructions the defendant sustained no injury because of the Court's refusal to repeat what had in substance been already said. We have carefully examined the general charge of the Court with the view to ascertain if the

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excuse assigned for the action of the Court is well founded, and are of the opinion that it is not. The general charge comprehended the legal propositions contained in some of the instructions which were requested and refused, but not in those embodied in the instructions above set forth. We have no doubt as to the right of the defendant to have the instructions under consideration given to the jury.

Objections are made by the defendant's counsel to portions of the charge of the Court to the jury which we shall omit noticing specifically, notwithstanding we are of the opinion some of such objections are not entirely without just grounds; but they can be avoided upon a new trial, we apprehend, without pointing them out further than to say that it would be better for the Court to avoid assuming any material fact in issue as proved, however clear to the mind of the Judge such fact may seem to be established, because it is the province of the jury, unaided by the Judge, to say whether a fact is proved or otherwise.

Judgment reversed, and a new trial ordered.

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APRIL TERM, 1867.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

APRIL TERM, 1867.

F. W. FRATT *v.* R. B. WOODWARD et als., AND F. W. FRATT *v.* R. H. BLOSSOM.

CONSTRUCTION OF BOUNDARY LINES GIVEN IN DEED.—If in a deed, the boundary line on one side of the land conveyed is described as running from a given monument easterly to a creek parallel with the southern line of another tract of land, and such southern line of the other tract of land is not a straight line, but meanders, then the boundary line described in the deed will run parallel with the other line in its meanderings, and not straight, and parallel with its general course.

MEANING OF WORD "EASTERLY."—The word "easterly," when used alone, will be construed to mean due east, but when other words are used for the purpose of qualifying its meaning, it means precisely what the qualifying words make it mean.

MONUMENTS AND LINES NAMED IN DEED.—The law will presume a straight line was intended in a description of land in a deed, when the call is simply from one monument to another; but when the call is from a monument to a creek, without naming a given point, the creek is not a monument in the sense of that rule.

LINE BETWEEN MONUMENTS GIVEN IN A DEED.—The law does not declare in favor of a straight line between monuments, where the language employed in the deed shows that a different line was intended.

EXTRINSIC EVIDENCE IN CASE OF AMBIGUOUS DESCRIPTION. — A boundary line described in a deed as commencing at a tree and "thence running easterly parallel with the southern line of said Antelope Ranch, according to the survey of the *same made by the United States Surveyor-General for said State, [220] to said Antelope Creek," is not repugnant nor ambiguous, and evidence *aliunde* is not admissible to show that a straight line was intended parallel with the general course of said southern line of said Antelope Ranch.

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MEANING OF WORDS "PARALLEL LINES."—By mathematical definition, "parallel lines" are straight lines; but in common speech about boundaries, the words are often used to represent lines which are not straight but photographs of each other, and Courts, in passing on questions of boundaries, often use them in the latter sense.

WORDS OF DEED.—A mere matter of convenience or taste cannot be allowed to overrule the express language of a deed.

APPEAL from the District Court, Sixth Judicial District, Sacramento county.

Job F. Dye had a grant of land made to him by the Mexican Government, which was confirmed by the United States. On the 19th day of November, 1857, he entered into the following contract with Fratt and King:

"Memorandum of a contract made this day between J. F. Dye of the first part, and Francis W. Fratt and Thomas F. King of the second part, to wit: The said J. F. Dye does agree to sell to the second party eight thousand acres of land, more or less, as may be found to be contained within the boundaries as described. To commence at the mouth of Antelope Creek; thence running up the River Sacramento to the old wood yard to a sycamore tree, marked with four notches; thence parallel with J. F. Dye's south line to Antelope Creek; thence up the centre of Antelope Creek to a large oak tree, about three hundred and fifty yards below the mouth of a slough running out of Antelope Creek through the prairie emptying in the Antelope again; thence east running parallel with J. F. Dye's south line to J. F. Dye's eastern boundary line, as surveyed by order of the Surveyor-General; thence southerly to J. F. Dye's southeast corner; thence to the place of beginning. Also, to deliver five hundred head of branded cattle, large and small, as they may come. Provided that the party of the second pay unto the said J. F. Dye twenty-six thousaid dollars."

On the 24th day of November, 1857, he executed to
[221] said *Fratt and King a deed of the land containing the following description:

"All the certain lot, piece, or parcel of land situate, lying, and being in the county of Tehama, State of California, and

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known and designated as follows: All that certain tract or parcel of land being a part of what is known as the Antelope Ranch, lying upon the eastern side of the Sacramento River, and beginning at a point on the eastern bank of the Sacramento River at the junction of Antelope Creek with said river; thence following the meanderings of said river northerly to a sycamore tree, with four notches, standing on the east bank of said river above an old wood yard at a point about one and a half miles in a direct line from said point of beginning; thence running easterly parallel with the southern line of said Antelope Ranch, according to the survey of the same, made by the United States Surveyor-General for said State, to said Antelope Creek; thence up the centre of said Antelope Creek to a point about four and a half miles up said creek, above where the said line strikes the same, to an oak tree on the eastern bank of said creek marked with three notches; thence parallel with said southern line to the eastern line of said ranch, according to said survey, and thence down the said southern line to the southeastern corner of said ranch, and thence along the southern line of said ranch to the point of beginning, containing eight thousand acres."

The land conveyed was a portion of the grant which was sometimes called the "Antelope Ranch." The plaintiff, before the commencement of these actions, had succeeded to all the rights of King in the premises. On the 26th day of November, 1862, Dye conveyed to the defendants, Woodward et al., the whole of the "Antelope Ranch," excepting from the deed the tract of land previously conveyed to Fratt and King.

The official survey of the grant, or the "Antelope Ranch," had not been made when the deed to Fratt and King was executed, and was not confirmed until some time in 1858. By said official survey this southerly line was not straight, but a *succession of straight lines, forming what is [222] called a broken line. Fratt claimed that the line described in his deed as commencing on the bank of the Sacramento River at a sycamore tree with four notches, and "thence running easterly parallel with the southern line of said Antelope Ranch * * * to said Antelope Creek," was

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not a straight line, but should run parallel with the southern boundary line of the Antelope Ranch as the same changed its course. By the latter claim he would get more land than he would by having a straight line. He commenced two actions in May, 1865, in Tehama county; one against Blossom, in ejectment, to recover possession of the land in dispute, and the other against Woodward et al., to recover damages for an alleged trespass in cutting trees on the same land. Blossom was the tenant of Woodward et al., who appeared in the action against him, and asked for affirmative relief. The place of trial was afterwards changed to Sacramento county. On the trial in the Court below, evidence was received tending to show that Fratt and Dye, at the time of and after the execution of the deed to Fratt and King, understood the line in dispute to be a straight line. Antelope Creek and the Sacramento River each run in a southwesterly direction. The creek is several miles east of the river. The actions were tried before the Court, and it was stipulated that the evidence taken in either cause should be read and used in the other. Plaintiff recovered judgment in each action, and defendants appealed.

The other facts are stated in the opinion of the Court.

G. F. & W. H. Sharp, for Appellants.

The line claimed by defendants is a straight line, and upon this fact alone defendants were entitled to recover. The line from the sycamore tree to the creek is a straight line, because the law presumes it to be so. All lines are construed to be straight ones, unless expressly controlled by the deed. (2 Wash. Real Prop. 632.) Where a line is to run between two monuments, a straight line is conclusively presumed. (Allen v. Kingsbury, 16 Pick. 235; Jackson v. Reeves, 3 Caine, [223] 293.) *The monuments are the sycamore tree and the creek. Where a line commences to run from a fixed monument on a given line to another, it must continue in the same direction. (Dawes v. Prentice, 16 Pick. 435.) This line commences from the sycamore tree and runs east. Where a direction is given, a due direction is presumed, unless controlled by the deed. (Bosworth v. Danzien, 25 Cal. 296.) By

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extending this line due east would render it a straight line. It will be presumed straight because it is to run parallel. Parallel lines are straight lines. (Davies' Legendre, 15.) Parties using scientific words are bound to know the meaning of them. (Morrison v. Wilson, 30 Cal. 344.) The language of the parties in the deed shows that a straight line was intended. Whenever running their courses by a river or other irregular line, they use appropriate words denoting that intention, as "meanderings," or "up the centre," the law will presume a line run by an irregular line would follow its meanderings, etc. The parties expressing the presumption of the law as to irregular lines, all other lines must be construed straight. *Expressio unius est exclusio alterius.* Parallels, like all other terms in science, have well and clearly defined meanings. They are straight lines, equidistant from each other. (Davies' Legendre, 15.) And this meaning of this term has received a judicial interpretation. (Croghan v. Nelson, 3 How. 196.) The call for parallel can be stricken out as *falsa demonstratio*, if it is inconsistent with the other calls in the deed. That it is inconsistent with every call in the deed, if plaintiff's theory is correct, we have abundantly shown. Striking out parts of description is of very frequent occurrence. (2 Pars. Con. 17.) Words necessary to ascertain the premises must be retained, but those not necessary for that purpose may be rejected. (4 Mass. 205; 6 Peters, 328.) If some part is inapplicable or untrue, and enough remains to show what was intended, the deed must be upheld, and the false and uncertain part rejected. (19 Wend. 175; 2 Johns. 471; 2 Mass. 388; 5 Id. 355.) The case of Magoun v. Lapham, 21 Pick. 135, completely covers this question.

**R. C. Clark*, for Respondent. [224]

It is contended for the appellants that the word "easterly" means due east. This would be true if there was nothing else to vary or control the line, and if the parties intended such to be the meaning of the word, in the connection in which they used it; for it is conceded in Morrison v. Wilson, 30 Cal. 344, that parties to a contract may give any meaning they please to the terms used by them, and that such mean-

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ing, when ascertained, shall be taken to be the true meaning of the word, so far as that contract is concerned. The word "easterly" is not the controlling word in the call, but is itself controlled by the words "parallel with the southern line of the ranch as surveyed," etc. Any line starting from the sycamore tree, and running any course between northeast and southeast, would satisfy the call "easterly," but there could be but one line that would satisfy the other portions of the call, and that line must be parallel with the southern line of the ranch as surveyed. Courses and distances in a call always give way to monuments, either natural or artificial. Defendants claim that the southern line of the ranch is a crooked line, and must be reduced to a straight line, representing its general course, and then a parallel run to the straight line thus obtained, because it is impossible to run a parallel to a crooked or curved line. This position has been declared to be untenable by this Court, and the rule settled in favor of respondent, in Hick *v.* Coleman, 25 Cal. 142. The line to be run in that case was "one league or five thousand varas parallel with the Cosumnes River." The Court say: "We think the plain construction of the call for the third line is that it is to run parallel with the river in all its meanderings, *and not parallel with its general course.* This is the obvious import of the terms parallel with the Cosumnes River. *No other line can be said to be parallel with the river.*" This authority would seem to be conclusive in our favor. It authoritatively establishes the fact that a parallel can be run to a crooked or broken or curved line, and in a proper case requires it to be done.

[225] Now *two lines equal in all their parts must be equal as a whole, and two lines parallel in all their parts must be parallel lines. The case of Van Gordon *v.* Jackson, 5 John. required the lines of a patent to be run curved or crooked, and the judgment of the Court below, which required the lines to be run straight, was reversed.

Robinson & Dunlap, also for Respondent.

The second call in the deed says: "Easterly, parallel with the southern boundary," etc. What would be more natural than to say *easterly,* when starting from a west line, to run

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parallel with a southern line, to show that they were to turn to the right, instead of the left. This of itself would be sufficient to account for the word *easterly* appearing. Now, if they had said "easterly to Antelope Creek," there would have been no difficulty: it would have been a straight line, and would not have been helped with a definition, but they add the words, "parallel to the southern line," etc. This limits the course to a line parallel with another line, at whatever point of the compass that might be. This could not be the line already run; because that was run *northerly*, thereby designating the west line of the ranch, and the parallel is to be to the *southern line*. Again, the last call of the deed starts at the southeast corner of the ranch, and runs along the southern line of the ranch to the place of beginning. There they expressly state what they understood by the southern line of the grant or ranch. This line is fixed by the survey of 1857, and it is a monument, and cannot be moved. If we establish the law to be that a parallel line is to be one equidistant, without any regard to direction, then the construction of this deed is plain. In Williams *v.* Jackson, 5 J. R. 505–6, the Court hold that the line should be run so as to be equidistant at every part, and whatever the course or angle, it seems to make no difference. In Jackson *v.* Bogardus, 5 J. R. 441, the Court holds that in running the lines they should be run at points *equidistant from the points or planes mentioned, [226] or in other words, parallel with certain crooked lines.

The case of Penn *v.* Baltimore, 1 Ves. Sen. 452, decides the same point, and holds the parties to a crooked parallel. These cases are referred to as showing good argument and authority for our theory of this survey, that a parallel line means one equidistant from the southern line of the ranch as surveyed in 1857, and by which we purchased. A straight line is only presumed when two monuments are given, and the line is from one to the other without any other direction. In this case there is but one monument which is fixed as a terminus of the line, to wit, the sycamore tree. The other end of the line is to strike Antelope Creek at some point between its mouth and the oak tree with three notches, which is five or six miles therefrom, and which forms the northwest

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corner of the survey or call of the deed. Now, to find the particular point on the creek where the line is to strike, the call of the deed says you must run a particular course, to wit, parallel to the southern line of the survey. This takes away any presumption of a straight line between monuments, because a course is given, and it lacks a monument at one end, which can only be found by following the given course.

By the Court, SANDERSON, J.:

The only point involved in these cases is answered by the case of Hicks *v.* Coleman, 25 Cal. 143. In that case, the third call or line in the deed was expressed in these words: "On the south or southeast by a line that runs one league, or five thousand varas parallel with the Cosumnes River." The language which describes the second line in the deed from Dye to Fratt and King, and upon the true meaning of which these cases turn, is as follows: "Thence running easterly parallel with the southern line of said Antelope Ranch, according to the survey of the same, made by the United States Surveyor-General for said State, to said Antelope Creek."

In Hicks *v.* Coleman, the land was bounded on one [227] side by *the Cosumnes River, of which the course was not straight, but meandering; and the question was, whether the line upon the opposite side, and which the deed described as parallel to the river, was to be a straight line parallel with the general course of the river, or a line with the same windings or curves as the river. We said: "We think the plain construction of the call of the third line is, that it is to run parallel with the river in all its meanderings, and not parallel with its general course. This is the obvious import of the terms 'parallel with the Cosumnes River.' No other line can be said to be parallel with the river."

The only difference between the language of the call in this case and the language in Hicks' case, lies in the use of two descriptive terms instead of one. In the latter case, the word "parallel" only is used, while in the former the words "easterly parallel" are used; but this does not vary the result; on the contrary, the result is the same as it would have been had

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the word "easterly" been omitted. No man looking at the map would hesitate to say that the Sacramento River constitutes the western boundary of the Antelope Ranch, and the junction of the Antelope Creek with the river its southwest corner, and the line running from the junction eastward its southern boundary. That such was the understanding of both Dye and Fratt is manifest from their testimony as well as the general reference to the location of the Antelope Ranch made at the commencement of the description in the deed, where it is spoken of as lying upon the eastern bank of the Sacramento River. They start at the junction and run thence "northerly," following the meanderings of the river, to a sycamore tree. Here they rest, and as they do not propose to follow the river any further, but to take a line leading from it, they designate the general direction of the new line as "easterly," that is to say, to the eastward of the river. It is true, as claimed by counsel for appellants, that the word "easterly" when used alone will be construed to mean due east; but that is a rule of necessity, growing out of the indefiniteness of the term, and has no application where other words are used for *the purpose of qualifying its meaning. [228] Where such is the case, instead of meaning "due east," it means precisely what the qualifying word makes it mean. Had they used the word "easterly" only, the law would have declared in favor of a straight line running due east from the sycamore tree to Antelope Creek; but having used another word in connection with it, both words must be consulted for the purpose of ascertaining their intent, for there is no such repugnance between the words as to require the rejection of either as a false demonstration. Giving to each word its proper signification, we have a line which leads off to the eastward of the river and which is also parallel with the southern boundary of the Antelope Ranch. While it is true that the law will presume a straight line was intended when the call is simply from one monument to another, yet Antelope Creek being a stream of several miles in length is not a monument in the sense of that rule, nor does the law declare in favor of a straight line between monuments where

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the language employed in the deed shows that a different line was intended.

The deed fixes no particular point on Antelope Creek to which the line is to be run. Yet to have fixed a point on the creek as the termination of the second line would have been as convenient as to fix the point on the Sacramento River, or the point on the creek above where the line leaves the creek. Why it was not done, is therefore manifest. They could not both fix that point and provide for a line which would be parallel with the south line of the ranch, for they were ignorant as to what the south line was—whether straight or broken—so by the exigencies of the case they were forced to elect between a straight line or one which would duplicate the south line, whatever upon a survey it might turn out to be. That they intended the latter alternative is clearly manifested by the language which they employed. Had they intended a straight east line from the sycamore tree to Antelope Creek it would have been the most natural thing in the world to have said so. To establish such a line, there could have been no occasion whatever to omit the location of [229] the *point on the creek, or to refer to the south line at all; and such omission and reference can be explained only upon the theory that the south line was intended, in any event, to control the direction or course of the line from the sycamore tree to the creek. They may have supposed that the south line was a straight line, and hence that the line between the river and the creek would also be straight; but it is quite clear that they did not act upon that supposition as their controlling idea, for they must have known that the south line might not turn out to be straight, and with that contingency before them, they expressly provided that the line which they were locating should be, not straight, but parallel with the south line. Hence, that the two lines should be parallel, whether straight or broken, was the controlling idea of the parties, is placed beyond a doubt, whether we look at the language of the deed only or take into consideration also the acts of the parties and the attending circumstances. That such was the case is especially apparent from

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the written contract of sale which was drawn up at the time. The line is there described by the word "parallel" only, nothing being said as to course. The word "easterly" was not inserted in the deed at the suggestion of either of the parties, but seems to have been inserted by the conveyancer, who drew the deed some time afterwards, of his own motion.

By itself considered the language of the deed is not repugnant or ambiguous, but of plain and obvious import, and there would seem to have been no occasion to resort to extrinsic evidence, but evidence *aliunde* was admitted notwithstanding the objection of the defendants, and we have therefore considered the question by its light as well as by the language of the deed; but we do not desire to be understood as implying that the evidence *aliunde* was admissible. On the contrary, had the judgments gone the other way, it is more than probable that we should have held that the Court erred in admitting it. If there was any mistake in drawing the deed these are not actions to reform or correct it, and the language, as *already intimated, does not seem to stand in need [230] of any explanation.

There is no force in the argument of counsel for appellants founded on mathematical definitions. By definition, parallel lines are undoubtedly straight lines; but in common speech about boundaries, or in a geographical sense, the words, as we all know, are often used to represent lines which are not straight but are the photographs of each other. The term is used for the want of a better and not because it in all respects fits the use to which it is applied. Even counsel, in arguing this case, and we, in considering it, have employed the word in this latter sense, and so have other Courts before us, in passing upon like questions. (Jackson *v.* Lucett, 2 Caines, 363; Williams *v.* Jackson, 5 Johns. 306; Winthrop *v.* Curtis, 3 Greenleaf, 103–110.) It is so used to avoid a circumlocution, and while such use is not technically exact, it is not obscure, and there is no difficulty in understanding what is meant. Nothing is more common than to speak of boundaries which are not straight as being parallel.

Nor is there any force in the argument founded upon the idea that parties in selling or buying land are more likely to

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measure by straight lines than by broken or curved, on the ground that the former are more convenient for the purposes of fencing and cultivation. Doubtless, straight lines are the most convenient for those purposes, and *ceteris paribus*, that circumstance would be entitled to weight; yet, according to Hogarth, curved lines are more beautiful than straight, and there is no reason why parties may not measure land by them if they choose to do so. At all events, a mere matter of convenience or taste cannot be allowed to overrule the express language of a deed.

Judgment and orders affirmed.

Mr. Justice RHODES did not express any opinion.

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[231] *WALTER H. TOMPKINS *v.* DAVID MAHONEY.

INSTRUCTIONS TO JURY.—It is not error for the Court to refuse to instruct the jury upon a point in relation to which there is no evidence.

NEW TRIAL.—A new trial will not be granted on account of the giving of instructions to the jury which could not have injured the party complaining.

ADMISSION OF EVIDENCE.—If a complaint in an action to recover money for legal services is general in its language, and the defendant demands and receives a bill of particulars, he cannot object to the admission of evidence under it.

CITATION UPON WRIT OF ERROR, AND UNDERTAKING THEREON.—The Judge of the United States District Court for the District of Oregon has no authority, while holding the Circuit Court of the United States for the District of California, to sign a citation upon a writ of error from the Supreme Court of the United States to the Supreme Court of this State, nor has he authority to take and approve of the security required in order to make the writ of error a supersedeas and operate as a stay of execution upon the judgment to be reviewed.

APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

The following is a copy of the complaint in this action:

"The plaintiff complains of the defendant, and for cause of action herein alleges, that prior to the commencement of this suit the plaintiff rendered services to the defendant, as the attorney of and for the defendant, upon his retainers, in the prosecution and defence of divers causes, suits, and business

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of and for the defendant, and in counselling and advising him, at his request, and for divers journeys and other attendances in and about the business of the defendant, at his request. And this plaintiff further alleges that the said services were reasonably worth the sum of thirty thousand dollars, which sum the defendant undertook and promised to pay, and the same is still due and unpaid, and due demand thereof was made by the plaintiff of the defendant. Wherefor, plaintiff prays judgment against said defendant for said sum of thirty thousand dollars, with interest thereon from the time of the commencement of this suit, and for his costs herein."

The defendant objected to any evidence being received in the action, for the reason that the complaint did not state facts sufficient to constitute a cause of action. The Court *overruled the objection. The plaintiff recovered judg- [232] ment, and the defendant appealed.

The other facts are stated in the opinion of the Court.

John B. Felton and *Theodore H. Hittell*, for Appellant.

Hall McAllister, for Respondent.

By the Court, SAWYER, J.:

This is an action to recover the value of professional services rendered by plaintiff as an attorney at law to defendant. The Court refused to give to the jury the following instruction asked by defendant: "If the jury find that there was a mutual understanding between plaintiff and defendant that only in the event of recovering to the extent of the exterior boundaries, and finally securing those outside lands, the plaintiff was to receive as his compensation a portion of the profits, either in land or its worth, from the plaintiff, then plaintiff would not be entitled to recover in this suit fees for that service in event of failure so to recover the lands." The Court, at request of plaintiff, stated substantially to the jury that such an agreement as referred to in the said instruction refused was void under the Statute of Frauds unless in writing, and added: "But if you find there was such an agreement in writing, then the plaintiff cannot recover in this action for

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such services unless its terms have been performed, abrogated or modified." The refusal of the defendant's instruction, and the charge to the jury that such an agreement would be void under the Statute of Frauds unless in writing, are the rulings principally relied on to reverse the judgment. We shall not discuss the question whether there would have been error in the action of the Court had the evidence been different; for we think the respondent clearly right in the position, that there is no evidence in the record requiring any instruction at all on the point. It affirmatively appears that the record contains all the evidence on the point, and there is no evidence which would justify a jury under any circumstances in [233] finding *a contract, either verbal or written, of the character referred to in the instructions refused and given, to which the exceptions relied on relate. The plaintiff and defendant both testified as witnesses on their own behalf. The plaintiff expressly denies any such contract. The defendant, at the close of his testimony in chief, says: "At a meeting in Sharp's office, where Sharp, Tompkins, Bergen, and myself were present, Sharp demanded that I should make deeds to himself, Tompkins, and Bergen of interests in the ranch, claiming that it was to be within the half league. I refused, and told them I was not to give anything within the half league. After we went out, Tompkins told me I did right." He certainly did not state or intimate any contract of the kind in this. He merely states a demand of Sharp, in the presence of Tompkins, and his own refusal, and that after Sharp left, Tompkins said he did right. But upon what grounds Tompkins said he did right, or what objects he and Mahoney had in view at the time, does not appear. There is certainly nothing here inconsistent with Tompkins' testimony.

On cross-examination by plaintiff's counsel, the defendant testified as follows:

"I want to know what evidence has Tompkins, or any person, of his having a future interest in this rancho?"

"He has got no interest in this rancho except an implied verbal understanding with him that he should share in it."

"Has Tompkins any paper now to that effect?"

"No."

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"You were quarreling about the matter of fees?"

"We disagreed about the prices marked on this paper."

"Why were you disagreeing about these figures if he had an interest in this land?"

"I told him, as I told you, I always had it in my mind that up to the decision and the restitution in case No. 5, I paid him for his services, and I thought he was satisfied, and all outside of that was to be considered as property acquired, and *I was, as I supposed, to get an equal [234] share with him and Sharp."

This is all the testimony of the defendant upon the point. He states no contract with Tompkins, verbal or written. He expressly says there was no written contract. He says, directly, that Tompkins "has got no interest in this rancho, except an implied verbal understanding with him that he should share in it." He would, perhaps, like to have it inferred from this exception that there was some sort of an *implied* understanding, although he seems careful not to say directly that there was. It is not easy to understand what defendant means by "implied verbal understanding," introduced by way of exception. He evidently did not claim that there was any *express* understanding, and there could be no contract of the kind supposed unless it was express.

His last answer merely stated what he had before said to Tompkins while disputing the amount of his charges, and afterwards repeated to his counsel. It affirms nothing as a fact, except that he had so stated before. Now, if there was any contract, verbal or written, upon the subject, Tompkins and Mahoney are the very parties to know it, and Mahoney went upon the stand to testify in his own behalf—to make the very best case in his own favor that the facts within his knowledge would admit of. If he failed to state categorically and directly that there was a contract or understanding upon the subject favorable to himself, or what the contract was, we may safely conclude that there was none. He would not leave a matter so important to his interest to be inferred from hints and vague inuendoes He did not state any. Bliss also testified that on one occasion Mahoney, in the presence of plaintiff, said "that 'Tompkins was in on the exteriors,' and

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Tompkins made no reply thereto." This, in connection with the testimony that Tompkins devoted several years to the service of Mahoney in litigation about the rancho, without any express agreement as to compensation, is the testimony upon which the jury was expected to infer the contract supposed in the instructions. The loose and vague remarks [235] quoted from *Mahoney's testimony and the other slight circumstances appearing, if there was nothing to the contrary in the record, are wholly insufficient to justify an inference that such a contract as claimed existed.

The Court might have safely instructed the jury, that upon the testimony, it was unnecessary for them to consider the question. Except as to the amount, the jury found the only verdict that could properly have been found on the evidence, and if the plaintiff was entitled to recover at all, the instructions given and refused could not affect the amount. The case is clearly within the principle of Lyle *v.* Rollins, 25 Cal. 438, and Carpentier *v.* Gardiner, 29 Cal. 160, and a finding upon the evidence in this record, that there was a verbal or written contract or understanding between the plaintiff and defendant of the nature indicated in the instructions under consideration, would be set aside as unsupported by the evidence. It could make no possible difference to the defendant, therefore, whether the instructions were given or refused, and he could not have been injured. (Terry *v.* Sickles, 13 Cal. 429.)

The evidence is clearly sufficient to justify the jury in finding for the plaintiff to the amount of the value of the services rendered.

The complaint is sufficient to justify the admission of the evidence. It is quite general in its language, but the defendant, as he was entitled to do, demanded and received a bill of particulars.

We find nothing further in the record requiring comment, and nothing to justify a reversal of the judgment.

Judgment and order denying new trial affirmed.

After the decision of this case by the Supreme Court, and before the remittitur had been issued, the Judge of the United States District Court for the District of Oregon, who, by the

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request of one of the Justices of the Supreme Court of the United States, was holding the Circuit Court of the United States for the District of California, signed a citation upon a writ of error from the Supreme Court of the United States *to the Supreme Court of this State, and ap- [236] proved of the security required in order to make the writ of error a *supersedeas*, and operate as a stay of execution upon the judgment. The Clerk, for the reasons above stated, refused to issue the remittitur. Respondent's counsel thereupon moved the Supreme Court for an order that the remittitur issue.

By the Court, SAWYER, J.:

Application for a remittitur. The only question on this application is, whether the Judge of the United States District Court for the District of Oregon, while holding the Circuit Court of the United States for the District of California, upon the request of the Judge of the Supreme Court of the United States assigned to that circuit in pursuance of the act of Congress, is authorized by the acts of Congress to sign a citation upon a writ of error from the Supreme Court of the United States to this Court, and to take and approve of the security required in order to make the writ of error a *supersedeas* and operate as a stay of execution upon the judgment to be reviewed. It is conceded that the Judiciary Act of 1789 confers no such authority upon the District Judge, for, by the express terms of the act, the citation must be "signed by the Chief Justice or Judge or Chancellor of the Court rendering or passing the judgment or decree complained of, or by a Justice of the Supreme Court of the United States." (1 Stat. at Large, U. S., 86, sec. 25.) And by section twenty-two the security is to be taken by the Justice or Judge signing the citation. But section two of "An Act to provide Circuit Courts for the Districts of California and Oregon, and for other purposes," approved March 3, 1863, provides, that, "There shall hereafter be Circuit Courts held for the Districts of the States of California and Oregon by the Chief Justice, or one of the Associate Justices of the Supreme Court of the United States assigned or allotted to the circuit to which such dis-

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tricts may respectively belong, and the District Judges of said district, severally and respectively, either of whom shall [237] *constitute a quorum, which Circuit Courts and the Judges thereof shall have like powers and exercise like jurisdiction as other Circuit Courts and the Judges threreof" (12 Stat. at Large, U. S., 794); and section one of another act, approved on the same day, provides "that whenever the Judge of the Supreme Court for any circuit, from disability, absence, the accumulation of business in the Circuit Court in any district within his circuit, or from his having been of counsel or being interested in any case pending in such Circuit Court, or from any other cause, shall deem it advisable that the Circuit Court in such district shall be holden by the Judge of any other circuit, he may request, in writing, the Judge of any other circuit to hold the Circuit Court in such district during a time to be named in such request; and such request shall be entered upon the journal of the Circuit Court so to be holden. And thereupon it shall be lawful for the Judge so requested to hold the Circuit Court in such district and to exercise all the powers of the Judge of such circuit within and for such district during the time named in such request." (Id. 768, sec. 1.) And it is claimed that these provisions authorize the District Judge of Oregon, while holding the Circuit Court of the United States for the District of California, upon the request of the Justice of the Supreme Court of the United States allotted to said circuit, or of the Chief Justice, to sign citations and take security upon writs of error from the Supreme Court of the United States to this Court.

The argument is, that a Justice of the Supreme Court of the United States is the Circuit Judge; that a Justice of the Supreme Court is authorized to sign citations under the provisions of the act of 1789; that the act of 1863 authorizes the Judge requested to hold the Circuit Court in such district "to exercise all the powers of the Judge of such circuit, within and for such district, during the time named in such request," and as the Justice of the Supreme Court is Judge of the Circuit Court and is authorized to sign citations, the Justice of the District Court, while exercising "all the powers of

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the Judge of such circuit," must also have power to sign *citations, otherwise he cannot exercise all the powers [238] of the Judge of such circuit. But the vice of the argument consists in confounding the different characters in which the several Judges act. The Circuit and Supreme Courts of the United States are different, distinct, and wholly independent Courts, differently organized, and exercising different, and in no respect concurrent, jurisdiction. With respect to each other, one is a Court of original, and the other of appellate, jurisdiction. The Supreme Court not only exercises appellate jurisdiction over the judgments of the Circuit Courts, but, in certain cases, over final judgments of the highest State Courts. But neither the Circuit Courts of the United States nor their Judges, as such, have any relations with State Courts. Signing a citation on a writ of error from the Supreme Court of the United States to a State Court is an act pertaining to the exercise of appellate jurisdiction, and the power is therefore very properly conferred upon a Justice of the appellate Court, as such. The Justices of the Supreme Court, under the provisions of the act of Congress establishing Circuit Courts, are assigned to certain circuits, and are authorized to hold the Circuit Courts. But while so holding Circuit Courts they are acting as Circuit, and not as Supreme Court, Judges, and exercising a jurisdiction entirely different from that which they exercise as Justices of the Supreme Court. They are acting simply as Circuit Judges, under express provisions of the statute relating to those Courts, and making them Circuit Judges. There is no necessary connection between the Circuit Courts and the Justices of the Supreme Court. The whole matter depends upon the provisions of the statute. The former Circuit Court for the Districts of California had a Circuit Judge of its own provided for by law, and was never held or authorized to be held by a Justice of the Supreme Court. Yet it had the same jurisdiction as other Circuit Courts. That person is a Circuit Judge whom the law makes a Circuit Judge, and while acting as Circuit Judge he only exercises those powers which pertain to the Circuit Court and its Judge—to the business of that Court. Under the second section of the first act of 1863, *before cited, [239]

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the Justice of the Supreme Court assigned to the circuit embracing the districts of California and Oregon, and the District Judge of the District of California, or *either of them*, are authorized to hold the Circuit Court for said district. They are both, then, when holding the Circuit Court, Judges of that Court. One no more so than the other, under the terms of the act. We can no more say that the Judge of the Supreme Court is the Circuit Judge of the Circuit Court than that the Judge of the District Court, while holding that Court, is the Circuit Judge for that district; and the Justice of the Supreme Court must have so construed the act; and further, that the Judge of the District of Oregon was a Judge of another circuit, within the meaning of the act, or he could not have requested the District Judge of Oregon to hold the Court, under the first section of the act of 1863, secondly cited, which only authorizes him to "request in writing the Judge of any other *circuit* to hold the Circuit Court in such district." Either the Justice of the Supreme Court or the Judge of the District Court, while holding the Circuit Court, is Judge of the Circuit Court, and exercises the powers only of a Circuit Judge by virtue of the provisions of the statute organizing the Circuit Courts and defining their jurisdiction, and providing who shall act as the Judges of such Court, and not by virtue of those provisions severally organizing and defining the jurisdiction of the Supreme and District Courts and providing Judges for such Courts. While holding the Circuit Court, the Justice of the Supreme Court does not exercise the powers pertaining to the Supreme Court, nor does the District Judge exercise the powers pertaining to the District Court, but each, as Circuit Judge, exercises the powers and jurisdiction pertaining to the Circuit Court and transacts the business only belonging to that Court. If, while holding a Circuit Court, the Justice of the Supreme Court transacts any business at chambers pertaining to the Supreme Court, he does it as Justice of the Supreme Court and not as Judge of the Circuit Court; and the same may be said of the District Judge. If he transacts any business pertaining to the [240] District *Court he does it as District Judge. We can no more refer to the powers of the Justice of the Su-

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preme Court relating to the business and jurisdiction of the Supreme Court, for the purpose of enlarging the powers of a District Judge while holding a Circuit Court, so as to embrace business with which that Court has no concern, than we can refer to the powers of the District Judge, as such, for the purpose of limiting his powers when holding a Circuit Court. The provisions of the acts of Congress under which the power is claimed, in this instance, to have been conferred upon the District Judge of Oregon, relate wholly to the Circuit Courts. The whole object of the provision was to provide for holding Circuit Courts and for the exercise of Circuit Court jurisdiction. This was the entire subject-matter to be provided for, and the act must be construed with reference to the object to be accomplished. It is clearly manifest that no reference was intended to be made to the exercise of appellate jurisdiction over the judgments of State Courts. In signing a citation of the kind in question, a Justice of the Supreme Court would in no case act as Circuit Judge. There is no authority given him to sign in that character. The Justice of the Supreme Court allotted to the Tenth Circuit has no more, and no less, power in the premises than the Chief Justice or any of the Associate Justices of the Supreme Court of the United States. They, as well as he, get their power from those provisions defining their powers as Justices of the Supreme Court, and not those provisions defining their powers as Circuit Judges. And it is only the powers which they exercise as Circuit Judges that are conferred on the District Judges when they, also, under similar statutory provisions, act in the capacity of Circuit Judges. It is clear to our minds that the District Judge of Oregon had no jurisdiction, while holding the Circuit Court for the District of California, to sign the citation or take the security in this case, and that his act is void. It follows that the citation and security taken do not operate as a *supersedeas* in this case. (See Hogan *v.* Ross, 11 How. 296; Saltmarsh *v.* Tuthill, 12 Id. 389; United States *v.* Curry, 6 Id. 113.) *This is the view taken by Judge Pratt in a lucid [241] opinion recently delivered in the Twelfth Judicial District, in the case of Donner *v.* Palmer, and we think it correct. (1 Pac. L. Mag. 291.) Ordered that the remittitur be issued.

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SAMUEL J. SHERMAN v. D. S. K. BUICK AND JOHN CARRICK.

[1] CONSTITUTIONALITY OF LAW FOR OPENING ROADS.—The Legislature has the constitutional power, under the right of eminent domain, to pass laws for opening roads, called in the statute "private roads," from the main roads leading through the country to the residences or farms of individuals, and over lands not belonging to the persons to whose residences or farms the roads thus opened lead.

ROADS CALLED "PRIVATE ROADS" ARE FOR PUBLIC USE.—Roads leading from the residences or farms of individuals to the main road which runs through the country, called in the statute "private roads," are of public concern, and under the control of the Government, and are open to every one who may have occasion to use them, and are therefore public roads.

[1] LAND TAKEN FOR ROADS IS NOT APPLIED TO PRIVATE USE.—A law providing for opening a road from the farm or residence of A, across the land of B, to a main road leading through the country, upon just compensation being made, does not have the effect of taking the private property of B and applying it to the private use of A.

CONSTITUTIONALITY OF LAWS.—In passing on the constitutionality of a law, it is the duty of Courts to look to the true object of the law, and to trace out its true result, and not to be guided by those objects or results which the Legislature may have mistakenly declared; and if the law be found to be consistent with the Constitution, or within the acknowledged power of the Legislature, to uphold it.

ALL ROADS ARE PUBLIC.—The phrase "private road" is unknown to the common law. All "roads" are public.

ROADS IN SANTA CLARA COUNTY.—The act for opening roads in Santa Clara county provides for compensation to be made for the land taken for the road.

ANSWER IN ACTION FOR TRESPASS IN OPENING ROAD.—In an action for damages for an alleged trespass upon the plaintiff's land, if the defendant justifies the alleged trespass under the act in relation to laying out and establishing roads, he must in his answer show a strict compliance with all the provisions of the statute.

LAYING OUT ROADS.—Whether a given road will subserve the public need or convenience is a question for the Government alone to determine. The Courts have nothing to do with it.

APPEAL from the District Court, Third Judicial District, Santa Clara county.

[242] *The trespass was alleged in the complaint to have been committed on the 1st day of March, 1866. The action was commenced April 28th, 1866.

The other facts are stated in the opinion of the Court.

Peckham & Payne, for Appellants.

It will not be presumed that the Legislature intended to

[1] Approved, Brenham v. Story, 39 Cal. 189. Control of Board of Supervisors over roads, ferries, and bridges, cited, Kimball v. Board of Supervisors, 46 Cal. 24.

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violate the Constitution, and if the law is susceptible of two constructions, one of which will place it in antagonism with the Constitution, and the other will not, that which will not thus place it must be adopted. (People *v.* Reed, 6 Cal. 228; People *v.* Langdon, 8 Id. 11; Charles River Bridge *v.* Warren Bridge, 7 Pick. 446.) We concede the rule to be that private property cannot be taken for private use under the Constitution. Private property, however, may be taken for public use, upon making a just compensation. Two questions are here presented:

First, What is a public use, within the meaning of the Constitution?

Second, Which is the ultimate judge of the question: the judicial or the legislative department of the Government?

In answer, we lay down the following rules as being consistent with all, and sustained by most of the authorities:

First—Taking the property of one man and transferring it to another to be done with as he, the other, sees fit, is taking private property for private use, and is not within the province of legislative authority.

Second—Taking the property of one man and transferring it to another for a particular use, where that use by him will in no manner result to the safety, interest, convenience, or expediency of the State, or to the wants, benefits, or convenience of the people generally, or of any considerable portion of the people, either directly or indirectly, is a taking not within the province of legislative authority.

Third—But the taking of one man's property and transferring it to another for a particular use, where that use will either directly or indirectly inure to the safety, interest, *convenience, or even expediency of the State, or to the [243] wants, benefits, or convenience of the people generally, or of any considerable portion of them, whether it be for building forts, arsenals, docks, wharves, roads, highways, mills, manufactories—opening the avenues of trade, commerce, and communications; supplying the people with the wants of life, as water or any other necessaries, or in improving the country, opening up the avenues of labor, or ameliorating the condition of the people, is a legitimate exercise of the power

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of eminent domain, and the only restriction upon it is that just compensation shall be made.

Fourth—Where the use will not benefit any but the person to whom the property is transferred, it is a clear case of an unconstitutional taking, and a judicial question. Where it will benefit others, the question as to how many others it should benefit to warrant the exercise of the power, cannot in the nature of things be tested by any fixed standard; and cannot for this reason be a judicial question, but one resting exclusively in the discretion and wisdom of the Legislature.

Acts for the condemnation of lands and water privileges for mill sites were held to be constitutional in Harding *v.* Goodlett, 3 Yerg. 41; Boston and Rocksbury Mill Corporation *v.* Newman, 12 Pick. 467; Newcomb *v.* Smith, 1 Chandler, 71; and Gotthelf *v.* Voegtlander, 3 Wis. 46. Where the Court can see that the building of a basin in the State for the terminus of a canal made in another State will be of any benefit to the neighborhood, such benefit will feed the power of eminent domain; and whether the case is one for the proper exercise of that power is for the Legislature to judge, and the judicial department has no power of review. (Morris Canal Co. *v.* Townsend, 24 Barb. 658.) It belongs to the Legislature to determine whether the benefits to be derived to the public by such improvements are sufficient to justify the exercise of the power of eminent domain. (Bloodgood *v.* The M. and H. R. R. Co., 18 Wend. 9.)

The Legislature is the sole judge as to the necessity of taking private property for public use. (Vanhorne *v.* [244] *Dorrance, 2 Dall. 304.) The power of eminent domain resides in the Legislature. They are the exclusive judges as to the proper cases for its exercise, and the judiciary cannot review their action. (Dunn *v.* The City Council, Harp. 189.) So in the exercise of the power of eminent domain, the Legislature is the exclusive judge of the necessity, and of the degree and quality of interest in the land which it is proper to take for the public. (De Varaigne *v.* Fox, 2 Blatch. 95.) And as to the right of private individuals to condemn property under the acts of the Legislature for their purposes, it was held that such acts are constitutional when the use

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will be convenient to a large portion of the public, though *private profit* may be the *leading motive*, and that as to what is public convenience the Legislature may determine; and when determined, the Courts will presume it correctly done. The question does not, in judicial consideration, depend on the proportion which the public interest bears to that of the private individual. (Commonwealth *v.* Breed, 4 Pick. 460; Spring *v.* Russel, 7 Green, Iowa, 273.) The question as to whether the public necessity and convenience demand the taking of private property is one over which the legislative power is the exclusive judge. (Charles River Bridge *v.* Warren River Bridge, 7 Pick. 453–466.)

Is the laying out and establishment of private roads such a use as will justify the exercise of such a power? Plaintiff answers in the negative, and cites the only case bearing upon the subject on his side of the question—the opinion of a majority of the Court in Taylor *v.* Porter, 4 Hill, 140. In solving the question, the first thing to be ascertained is as to what constitutes a private road within the meaning of the act of the Legislature, and who has a right to use it. Is the right of user limited to the person at whose instance it is created, or has every citizen of the State a right to use it at his pleasure? If every citizen of the State has a right to use it, then no question can exist as to the constitutionality of the law, any more than of that for the laying out and establishment of *public roads. The public right and the public [245] use exist, and the benefits exist, only in a less degree.

Private roads, unless synonymous with private ways, are an institution unknown to the common law. Private ways are co-existent with its earliest history. They are created by grant, prescription, or arise from necessity. But a private way, created by act of the sovereign power, is something of which we have never read in any treatise upon the common law. Private ways are for the use of private individuals. The rules and relations of parties to them are well settled both in England and in the United States. Private roads are of American origin, and we must look to the American statutes and American decisions to ascertain what they are, how they are created, and what the respective rights of the parties

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are in reference to them. The term "private road," when used in American statutes without qualification, has been construed, not only by use among the people, but judicially by the Courts, by the people by common consent. They have existed from the earliest period of our colonial history; and so far as we have been able to discover, the right of each and every citizen to use them for the purposes of passing and repassing over them has never been challenged in the Courts. We can safely say that no reported case can be found in the United States where any man has been successfully prosecuted for passing over any private road laid out and established on the application of another, in pursuance of an act of the Legislature. (Allen *v.* Stevens, 5 Dutch. 507; Metcalf *v.* Bingham, 3 N. H. 459.)

Thomas Bodley, for Respondent.

The road law of 1861, under which defendants justify, has been declared unconstitutional. (Curran *v.* Shattuck, 24 Cal. 432.) Admitting, however, that the act as taken in connection with the act of 1864, is constitutional, then we insist that the proceedings taken in this case as set up in the answer do not comply with its terms. He who relies for a title or right upon an extraordinary mode of acquisition given him by [246] *law, against the will of the owner, must show a strict compliance with the statutory rules from which his title accrues. (Bensley *v.* Mountain Lake Water Co., 13 Cal. 315; Sedg. Stat. and Const. Law, 319; 24 Cal. 432.) The proceedings in this case were fatally irregular in several particulars. We contend that as to whether property, in any given case, has been condemned for a public or private use is and can be nothing but a purely judicial question. Otherwise the solicitude of the framers of our Constitution for protecting rights would be of no avail. The Legislature would only have to pass a law and say that the powers conferred are for the public use, and the mouths of Courts would be closed. In cases of the contemplated taking of private property for a public use, we concede it to be a matter of legislative discretion as to whether the public use is so important as to justify the exercise of the right of *eminent domain;* but as to *what*

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constitutes that use is nothing more nor less than a naked judicial question. The only question which we care to discuss is as to whether the *taking* in this case was for a *public use*. If it is, then there is an end of the constitutional question, so far as this branch of the case is concerned. The Constitution fails to define the meaning of the term "public use." Common sense, then, must be the expounder. It seems that there ought to be but little difficulty in the task, so far as the case at bar is concerned. The question as to whether the contemplated road is a public improvement for the use of the public, ought to be determined by the fact who is to use it? The public at large or the petitioners? The case of Taylor *v.* Porter, 4 Hill, 140, is directly in point. If that decision is good law, then this judgment must be sustained. In New York a private road is private property. The same is true of our private roads. A private road in California may be located and established upon the petition of one citizen. He alone must pay the expenses of the condemnation, the damages and cost of the land, etc., the expenses of erecting gates and other protections, and must keep the road and these protections in repair. We confess that we are at a loss to see how counsel *can conclude that a private road laid out [247] under our statute becomes *public property*. We think that the petitioner alone is entitled to the use. Others can use it to the same extent and no further than they could his private inclosure. In a word, the owner of a private road, established by condemnation of land under our law, can maintain an action of trespass against any person, and for any cause that he could for trespass upon any other part of his private inclosure. The very name "private road" indicates its true character. If it had the properties of a public road it would also have been made and kept in repair by the public. But it is private property, and is a subject of alienation just as much as the petitioner's own land. This will not be denied where the right is secured by agreement between the parties in interest. We can see no difference in the right acquired, whether by contract between the parties or by statutory process of condemnation. The Legislature in the latter case, (provided the owner of the land over which the road is

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to run refuses to sell the right of way,) proceeds to appropriate by process of law that right which might have been settled between the parties by agreement. It is simply a forced sale by the owner of the land to the petitioners. When the right is perfected by either process—by private contract or by condemnation—the characteristics of the road, and the rights settled, are the same in every particular. View this case in any light we may and it can only be considered an attempt on the part of the Legislature to condemn lands to the private use of another. There is no possible use to which such a road can be appropriated by the public any more than a private passway inside of the inclosure of any farmer in the State. A "public use" means "a use which concerns the whole community." Again: "It must be of such a character as that the general public may, if they choose, avail themselves of it." (Gilmer *v.* Lime Point, 18 Cal. 229; 16 Curtis, 809; Dickey *v.* Tennison, 27 Miss. 373.)

[248] *By the Court, SANDERSON, J.:

The plaintiff sues to recover damages for an alleged trespass upon his land. The defendants justify the supposed trespass by virtue of certain proceedings had by the Board of Supervisors of Santa Clara county, in which the land is situated, under the provisions of certain acts of the Legislature in relation to public and private roads. (Stats. 1861, p. 389; 1863–64, p. 248.) The proceedings in question were had under the provisions of the statute which relate to the laying out and establishing of what are there called private roads. (Stats. 1861, p. 392, sec. 7.) The plaintiff demurs to the answer of the defendants, so far as it relates to the action of the Supervisors, and makes the points: First—That the statute in question, so far as it relates to what are there called "private roads," is unconstitutional and void; and Second—That the answer fails to show a compliance with the provisions of the statute in laying out and establishing the road in question. These points were held to be good in the Court below and the defendants have brought them here.

Section seven of the act of 1861, which is made applicable to Santa Clara county by the act of 1863–64, above cited,

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(sec. 2,) provides that "any person or persons desiring to establish a road for private convenience, and which is not intended for the travelling public generally, may do so by consent of the parties owning the land affected thereby, but such consent, together with a specific description of the proposed private road, and the conditions in reference to gates, inclosures, or other matters agreed upon, shall be filed with the Board of Supervisors or their Clerk; and upon the filing of such consent and specific description, such road shall be recorded in the road record of the county, and shall become to all intents and purposes a private road, for the use of the parties interested; provided, that the parties for whose benefit such roads are established shall keep them in repair at their own expense, except that they may, by special consent of the Roadmaster of the district, spend the amount of their poll tax *upon such private roads, and for such ser- [249] vices they shall receive a certificate from the Roadmaster, on the same conditions and for the same purposes as provided for labor on public roads." Thereafter the statute proceeds to provide how such roads may be established when the owner or owners of the land will not consent. The proceedings are the same as in the case of public roads, except that only one petitioner is required. With the mode and manner, however, we are not called upon to deal, at this stage of the discussion, and sufficient has been already stated to show the character and intent of the statute—the first ground upon which it is claimed to be unconstitutional being not that it does not provide compensation for the land taken for the purposes of the road, but that it proposes to take private property for private use, which cannot be done, as claimed by counsel for respondent, even though compensation be made.

If, as claimed by counsel for the respondent, this statute was designed, or has the effect when enforced, to take the private property of A, without his consent, and apply it to the private use of B, though upon just compensation being made, we should not hesitate to declare it unconstitutional, as being an attempted exercise of power which the Legislature does not possess. In that view it would amount to a legislative sale and conveyance of A's property to B, or an easement

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in it, which amounts to the same thing, without the consent of the former. If such power is not denied to the Legislature in express terms, in the Constitution, it is by implication as satisfactory and direct as any express prohibition could have been. The acquisition, possession, and protection of property are classed among the inalienable rights of all men. (Art. I., sec. 1.) To acquire and hold property is a natural right, with which the Legislature cannot interfere, except by virtue of some express provision of the Constitution, which is framed for the protection and not the destruction of the natural right of every one to life, liberty, property, and the pursuit of safety and happiness. (Art. I., sec. 21.) No man can be de-
[250] prived *of life, liberty, or property without due process of law (Art. I., sec. 8); and due process of law means something more than mere legislation. In this respect property is put upon the same level with life and liberty, and the Legislature has no more power over the former than either of the latter, except as expressly provided in the Constitution, when it is taken for public use, or in the exercise of the power of eminent domain. Hence, if the legislation of this State in reference to private roads is constitutional, it is because it is an exercise of the power of eminent domain or the right which the Government has to take private property for public use upon making just compensation therefor.

Legislatures sometimes seem to mistake the powers with which they are vested, especially their nature and method of working, and hence not unfrequently, in the exercise of them they depart so widely from apt and proper modes as to cast a doubt upon their existence. Sometimes they seem to assume or declare results which do not necessarily follow. Sometimes they assume erroneous conditions as the foundation of a power which they are about to exercise. Sometimes they mistake, or, at least, give a wrong or inapt designation to the objects which they seek to attain. Hence they sometimes appear, upon first impression, to be dealing with an unknown, when, in fact, they are dealing with a familiar and universally acknowledged power. They handle it, however, with so much awkwardness, or with such apparently imperfect knowledge of the true ends and purposes which it was designed to accom-

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plish, and its modes of working, as to create in the mind of the casual looker-on the idea that they are working a power which is denied to them by the Constitution instead of the reverse.

With no power, of which they are possessed, do they seem to be less farmiliar, or to handle less awkwardly, than that of eminent domain. At times they wield it in such a manner as to seem to apply it to objects not within its reach. At times they fail, or seem to fail, to distinguish accurately between public and private ends, and if their terms and language be *alone consulted, to pervert the power to uses to [251] which it cannot lawfully be applied. Thus, by distinguishing or classifying roads or highways by the words "public" and "private," and providing different modes for their establishment and support, and declaring that the latter class "shall be, to all intents and purposes, private roads for the use of parties interested," they give color to the idea, that in their judgment, they have the power to create and are creating a road for private use, and to make and are making it the private property of certain persons to the exclusion of all others. If we look solely at their language without regard to the true nature of the only power which they possessed in the premises, an impression that the property of the owner of the land is taken for private use is created, for there is an apparent if not an express appropriation of it to the use of certain parties to the exclusion of all others. But it is well understood that the language of the Legislature is to be read in all cases by the light of the Constitution, with the spirit of which it is always presumed to be consistent. In construing it, it is the duty of the Courts to look to the true object and to trace out the true result, and not to be guided by those which the Legislature has mistakenly assumed or declared; and if they be found to be consistent with the Constitution, or within the acknowledged power of the Legislature, to uphold the act as to its legitimate results, and to discard all else. Thus: If the Legislature provides for the laying out and establishing of a certain class of roads or highways which from any cause, whether for the purposes of classification or otherwise, is denominated "private," or as being for

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the especial benefit of certain individuals upon whom the burden of cost and repair is cast, instead of the public at large, it by no means follows that such roads become the private property or estate of the individuals designated, even if the Legislature has so provided in express terms; for where roads are laid out, whether mainly for the accommodation of particular neighborhoods or individuals or not, it must be understood as having been provided for the use of every one who may have occasion to travel it, and hence [252] *as being public. In other words, the Legislature has no power to lay out and establish "private roads," in the sense that they are to be the private property of particular individuals, or that they are what are denominated "private ways" at common law; and hence, so far as they undertake to do so, their action is simply null and void; but the road so laid out and established becomes a way over which all may lawfully pass who have occasion, and therefore public; and the language employed by the Legislature, so far as it relates to the legal character of the road—as public or private—must be understood as being used for the purpose of distinguishing it from all other roads, or in general terms, for the purposes of classification.

In accurate legal contemplation, the term "private road" involves a contradiction. The term is unknown to the common law. It has its origin in American legislation. It cannot be regarded as having been employed as a substitute for the word "way," as used at common law. There was no reason or excuse for such a change in legal terminology. It must be taken, therefore, as an invention, and as having been put to use originally merely for the purposes of demonstration—as giving a name to a certain class of roads differing from another and larger class in respect to the steps to be taken in establishing them in the first instance and of keeping them in repair afterward—differences founded upon the just idea that roads, though public, which mainly subserve the convenience of particular individuals should be made a charge upon them instead of the public at large. For the purpose of distinguishing between such roads and those which subserve equally the interests of all, a name for the former was needed, for the legal

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term "highway" was alike applicable to both; hence the terms "public" and "private" roads. The latter is not to be understood as being synonymous with "ways" at common law, but as indicating a particular class of highways or public ways over which any one may pass without committing trespass.

To lay out and establish roads or highways is exclusively *within the power and control of the Govern- [253] ment. To do so is one of its most important and onerous duties. Roads or highways, over which the Government has supervision and which it is bound to provide, include not only the chief and principal thoroughfares which traverse the country, but also those of less general use which are lateral and serve to connect neighborhoods and individuals with the main arteries of trade and travel. Whenever the necessities or the convenience of the public, which includes everybody, requires a road, for the purposes of trade or travel, it is the duty of the Government to provide one, and, if necessary, to take private property for that purpose, upon making just compensation. Whether a given road will subserve the public need or convenience is a question for the Government alone to determine. The Courts have nothing to do with it. Should the Legislature be of the opinion that the general welfare and prosperity of the people would be promoted by the construction of a system of roads which would open a pathway from every man's house or farm to the main arteries of travel and the marts of trade and commerce, there is nothing to prevent them from providing that such roads may be opened. The ultimate decision of the question, whether a given road will subserve the public need or convenience, must rest somewhere, and it is wisely left for the Legislature to determine in such manner as they may provide. That the Legislature of this State is of that opinion, and have so provided, is apparent from the legislation under review. In the plan devised by them they have for the purposes of classification divided roads into "public and private," and provided how they may be laid out and established and how maintained. The former are to be laid out and maintained at the expense of the county or road district at large, and are therefore called "public." The lat-

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ter at the expense of such persons as are more especially and directly interested in them, and therefore called "private." But the latter are as much public as the former, for any one can travel them who has occasion—and no more can be said of the former. Whether a way be public or private [254] does not *depend upon the number of people who use it, but upon the fact that every one may lawfully use it who has occasion.

Had the word "private" and other words of like import been omitted from the statute, and instead thereof it had been provided "that any person or persons who desire a road to be laid out and established leading from their residences or farms to the main roads leading through their section of the country, and it shall appear that such road will be more to his or their benefit and convenience than the public at large, the Board of Supervisors shall have power to lay out and establish the same, provided," etc., there could be no doubt as to the validity of the act. In legal effect there is no difference between such language and that which has been in fact employed.

The case of Taylor *v.* Porter, 4 Hill, 140, which declares a contrary doctrine, stands comparatively alone, so far as we have been able to discover, and does not command our assent. Mr. Justice Bronson, by whom the majority opinion was delivered, construed the New York statute as creating "a right of way," in the common law sense of that term, in favor of one man over another man's land, and not as authorizing the laying out and establishing a species of highway, and as a matter of course, in view of that reading, held the act to be unconstitutional. The language of the New York statute on the question of "private or public" was much stronger in favor of the former than ours. It provided that the road, when laid out, should be for the use of the applicant, his heirs and assigns, and that the owner of the land through which it passed should not be allowed to use it unless he had signified his intention to do so before the damages were assessed. The Court was certainly correct in holding in effect that the Legislature did not possess the power to impress those conditions upon the road. To do so was to convert, or to attempt to convert the road into a mere common law right of

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way. But, in our judgment, the Court ought not to have held the entire act void on account of those conditions, but void as to the conditions only. As to the question which was in fact discussed in that case and decided, there cannot be two *opinions. If we assume that the New York [255] statute, or our own, has the effect to create a common law right of way merely in favor of A. over B.'s land without B.'s consent, the argument ends where it commenced, for it is too plain for argument that the power does not exist. But if we read the statute in the mode already suggested, it is equally plain that the Legislature has not usurped a power which it does not possess, but has merely departed from what is the more general and usual mode of laying out and establishing roads, and, in language which may be calculated to mislead, has adopted another which finds its warrant in the peculiar circumstances of a particular class, and for the purpose of distinguishing between the two classes, has called one public and the other private.

Our conclusion is that the act in question is not unconstitutional. (Metcalf v. Bingham, 3 N. H. 459; Allen v. Stevens, 29 N. J. L. R. 509; Brewer v. Bowman, 9 Geo. 37; Harvey v. Thomas, 10 Watts, 63; Pocopson Road, 16 Penn. St. 15; Hays v. Risher, 32 Id. 169.)

Roads leading from the main road, which runs through the country to the residences or farms of individuals, are of public concern and under the control of the Government. Taking private property for the purposes of such roads is not a taking for private use. They are open to every one who may have occasion to use them, and are therefore public. Their character as public roads is unaffected by the circumstance, that in view of their situation, they are but little used, and are mainly convenient for the use of a few individuals, and such as may have occasion to visit them socially or on matters of business, nor by the circumstance that in view of such conditions the Legislature may deem it just to open and maintain them at the cost of those most immediately concerned instead of the public at large. The object for which they are established is none the less of a public character, and therefore within the supervision of the Government. To call

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them "private roads" is simply a legislative misnomer, which does not affect or change their real character. By-
[256] roads is a better name for *them, and one which is less calculated to mislead the uninitiated.

The point made by the respondent, to the effect that the statute is unconstitutional because it does not provide compensation for the land taken for the purposes of the road, is not tenable. The law applicable to roads in Santa Clara county is found in the act of the 28th of March, 1864, (Stat. p. 248,) and sections one, two, three, seven, eight, nine, eleven, twelve, fourteen, seventeen, eighteen, nineteen, and twenty of the general act of the 16th of May, 1861. (Stat. p. 389.) The defect in the act of 1861, noticed by us in Curran v. Shattuck, 24 Cal. 430, is obviated in the act of the 28th of March, 1864, (secs. 3, 4, 5, 6,) where provision is made for the assessment and payment of damages.

The demurrer, however, was properly sustained upon the ground that the matter of the plea or defence of justification is insufficient. It is not necessary to notice all the points made by the respondent under this head. It is well settled that a party who claims a title or right, of the character set up by the appellants, must show a strict compliance with all the provisions of the statute. This the appellants have failed to do. The statute, among other things, requires that the chainman and marker employed in the survey by the Viewers shall be sworn before proceeding with the survey. It does not appear from the answer that this was done, nor does it appear that the appellant complied with the order of the Board of Supervisors in respect to gates. The Legislature has provided what shall be done in those respects, and the Courts cannot excuse a non-compliance therewith upon the ground of immateriality.

Judgment affirmed.

Mr. Justice RHODES did not express any opinion

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*MAGRAW v. McGLYNN. [257]

APPEAL TO THE SUPREME COURT OF THE UNITED STATES.—An appeal from the Supreme Court of this State to the Supreme Court of the United States is taken within ten days "after rendering the judgment" within the meaning of these terms as used in the act of Congress, and operates as a supersedeas, if the writ of error is sued out and lodged with the Clerk, and the proper security given, within ten days from the time a petition for rehearing is denied.

The Clerk of this Court declined to issue the remittitur, and an application was made for an order requiring him to issue it. The case is reported in 26 Cal. 420.

The other facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for the Motion.

More than ten days having elapsed between the "rendering the judgment" and bringing the writ of error, the writ of error did not operate as a supersedeas. (1 U. S. Stat. at Large, p. 85, sec. 23; U. S. ex rel. Crawford *v.* Addison, 22 How. 183–4.) "Rendering the judgment" (1 U. S. Stat. p. 85, sec. 23,) is the equivalent of "rendered" or "rendition" of judgment, (Pr. Act, sec. 336,) and is the act of the Court, and not its mere entry by the Clerk. (Gray *v.* Palmer, 28 Cal. 416; Peck *v.* Courtis, 31 Cal. 207.) And the doctrine in the Supreme Court of the United States is that the *time when the judgment may be said to be rendered* depends upon the practice of the Court rendering the judgment. (Silsby *v.* Foote, 20 How. 295.) "Judgment is affirmed" is "rendering the judgment" in this Court. (People *v.* Skidmore, 27 Cal. 292.) The act of Congress cannot be dispensed with by any Court, but must have its effect. (United States *v.* Curry, 6 How. 113; Hogan *v.* Ross, 11 Id. 297; Saltmarsh *v.* Tuthill, 12 Id. 389.)

J. P. Hoge, Contra.

The twenty-second section of the Judiciary Act of 1789 (1 Stat. at Large, 84,) provides for the review on writ of error to the Supreme Court, of all *final judgments* and decrees in *civil actions, and suits in equity in the Circuit Court, where the matter in dispute exceeds a [258]

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certain sum. But writs of error shall not be brought but within five years "*after rendering or passing the judgment or decree complained of*," etc. The twenty-third section provides: "That a writ of error as aforesaid shall be a supersedeas and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party, etc., within ten days, Sundays exclusive, *after rendering the judgment or passing the decree complained of*. Until the expiration of which term of ten days, execution shall not issue in any case where a writ of error may be a supersedeas," etc.

None of the cases cited by the respondent bear upon the question or throw any light upon it, except the case of Silsby et al. *v.* Foote, 20 How. 290, and that case, as we understand it, is directly opposed to his position, and sustains the views of the appellant. According to the rules and practice of this Court, when may its judgments be said to be *final*, in that sense meant and provided for by the act of Congress? Several of the rules of this Court bear upon this question. The twenty-first rule provides that all *opinions* delivered by the Court, after having been *finally* corrected, shall be recorded by the Clerk. The twenty-second allows fifteen days after judgment rendered or order made within which may be printed and filed a petition for rehearing, except in certain districts, and in those twenty-five days is allowed. The petition itself is made to operate as a stay of proceedings, until the decision of the motion, or the further order of the Court. The twenty-third rule provides that no remittitur shall issue until after the expiration of the time allowed by the rule to file a petition for rehearing, unless otherwise ordered by the Court. By the twenty-fifth rule, when a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the Court below. And by the thirty-ninth rule, the mode of reviewing the decisions of the Court, in proceedings for writs of mandate, shall also be by petition for rehearing as in other cases. It would seem to be [259] too clear *for question, from the reading of these rules, that their operation is to suspend the finality of the judgment, for the given time, and until the final decision on the petition for rehearing, if one be filed. Until then the

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whole matter is in the breast of the Court, is *in fieri*, and the judgment as announced, may be altered, modified, or entirely changed, and he who is the successful party on the first announcement of the opinion, may be the losing party on the final determination, which for the first time puts an end to the case and *finally* disposes of it. (Lee *v.* Tillotson, 4 Hill, 29; Weston *v.* The City Council of Charleston, 2 Pet. 449.)

By the Court, SAWYER, J.:

On the 6th of December, 1864, this Court filed its opinion and announced its judgment in this case, and a minute of the judgment rendered was entered by the Clerk in the record of that day's proceedings. A petition for rehearing was subsequently filed within the time allowed by the rules of this Court, and the remittitur stayed until the decision on the petition. The petition was denied on the 21st of January, 1865. On the 27th of January a writ of error to the Supreme Court of the United States was sued out and lodged with the Clerk of this Court and the proper security given. Was the writ sued out within ten days "after rendering the judgment," within the meaning of these terms, as used in the act of Congress on the subject, so as to operate as a supersedeas? (1 U. S. Stat. at Large, p. 85, sec. 22.)

The Supreme Court of the United States have construed this provision with reference to a strictly analagous state of facts. A final decree was rendered on the 10th of May. A petition to reopen the decree for certain purposes was filed on the 26th of the same month, in the same term, and denied on the 9th of June. An appeal was taken from the decree and the order on the 15th of June, and the proper bond given. It was claimed that the appeal was too late to operate as a supersedeas. The Court held the order not appealable; that the *final and appealable decree was rendered on the [260] 10th of May, but that the decree was suspended by the subsequent action of the Court and did not take effect until the 9th of June, and that the appeal was in time. (Brockett *v.* Brockett, 2 How. 240.) This case appears to us to be in point. The application to reopen a decree is substantially a petition for rehearing. At all events, the final judgment is as

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clearly suspended in one case as in the other. Whether this construction is right or wrong, it is authoritative, and must control the decision of this motion.

It follows that the appeal is in time and that the motion for a remittitur must be denied, and it is so ordered.

Mr. Justice RHODES did not express any opinion.

CHARLES V. STEWART *v.* WM. A. THOMPSON, ALONZO DE HARRO, CHARLES BROWN, WILLIAM P. LORING, AND D. D. SHATTUCK, EXECUTOR AND DEVISEE OF BENJAMIN D. BAXTER, DECEASED.

LIMITATION OF ACTIONS.—The limitation of actions for relief on the ground of fraud, to three years after the discovery of the fraud alleged, does not apply to an action to set aside and cancel a conveyance upon the ground that it is a cloud upon the title of the plaintiff, even if the Court is asked to set aside the conveyance because it was made to defraud a creditor.

APPEAL from the District Court, Twelfth Judicial District, city and county of San Francisco.

The defendant Brown, on the 23d day of May, 1855, executed his promissory note to Nathan B. Moore for the sum of three thousand dollars, payable on the first day of June, 1856, bearing interest at the rate of three per cent. per month, and said Moore, on the first day of October, 1857, assigned the same to M. C. Blake. Blake recovered judgment on the note in the District Court of the Twelfth Judicial District, city and county of San Francisco, on the 19th day of March, 1858.

An execution on the judgment was issued on the fifth [261] *day of March, 1859, and levied upon the interest of said Brown in two tracts of land in the city and county aforesaid, and on the 27th day of April, 1859, the Sheriff sold to said Blake Brown's interest in the land, and on the first day of November, 1859, executed to him a deed therefor. Blake, on the tenth day of September, 1862, sold the interest he acquired by the Sheriff's deed to the plaintiff.

Brown, at the time of the execution of the note, was the

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owner of the land, and on the 20th of September, 1855, deeded it to defendant Thompson, who, on the 10th day of September, 1857, deeded it to defendant DeHarro, and he, on the 6th day of June, 1861, deeded it to defendant Loring, and Loring, on the 10th day of June, 1861, deeded it to Benjamin D. Baxter. Baxter died about the 17th day of January, 1863, leaving a will, in which he nominated defendant Shattuck his executor, and Shattuck soon after entered upon the duties of the trust. The deeds from Brown to Thompson, and Thompson to DeHarro, and DeHarro to Loring, and Loring to Baxter, were recorded about the time they were given, but were fraudulent as to the creditors of Brown.

The plaintiff claimed in his complaint that the deeds were fraudulent, and a cloud upon his title. The defendants in their answer set up the Statute of Limitations of three years.

The facts were all set out in the complaint, and there was no averment that the fraud was concealed, or that the plaintiff or his grantor discovered the fraud within three years before the commencement of the action. The action was commenced on the 9th day of April, 1863. The Court found as a fact that the plea of the Statute of Limitations was not true. No demurrer was filed to the complaint.

The other facts are stated in the opinion of the Court.

J. J. Papy, for Appellants.

The complaint not alleging, and the finding of facts not showing, that there was any concealment of the various transactions alleged in the complaint, and there being no allegation in the complaint, nor any fact in the finding of the Court that *the plaintiff discovered these transactions within [262] three years next before the commencement of the action, the complaint is fatally defective, and the action is barred by the fourth subdivision of the seventeenth section of the Statute of Limitations of this State. (Carpentier *v.* City of Oakland, 30 Cal. 439; Boyd *v.* Blankman, 27 Id.; Sublett *v.* Tinney, 9 Id. 423; Story Eq. Pl. 751.) By an inspection of the complaint, it will be seen that all the acts alleged to be frauds upon plaintiff were committed more than three years before the commencement of this action, so that the

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complaint should affirmatively allege such facts as to justify the Court in sustaining the action. The complaint does not show that these various conveyances were concealed, or that plaintiff and his assignors did not know of their existence until within three years of the commencement of this action. On the contrary, it affirmatively shows that knowledge of their execution was had, as by the complaint we are informed when the deeds were recorded; therefore the complaint is fatally defective, and the judgment should be reversed.

E. D. Wheeler and *E. Cook*, for Respondent.

This is an action to remove a cloud from plaintiff's title. The action is recognized as a distinct remedy in equity, and its prosecution is a right incident to the ownership of a title that is clouded. As a condition precedent to the bringing of the action, plaintiff must have a title; consequently, until he acquires a title no action lies at his instance to remove a cloud therefrom; nor does this proposition involve the question as to whether plaintiff or his grantor, as creditors, might not have had some other relief in equity. It is enough that a party having a title that is clouded by fraudulent deeds has a remedy in equity for the express purpose of removing such cloud. The title did not vest till the Sheriff executed the conveyance to plaintiff's grantor. It cannot then, in any legal sense, be said that this action is barred. It is self-evident that if Blake had filed a bill to remove the cloud *before* he received the Sheriff's deed, he must have failed in his
[263] action. The *statute does not commence running till the cause of action accrues, and the right to remove a cloud from title cannot exist until a party has a title capable of being clouded. (Hager *v.* Shindler, 29 Cal. 47.)

By the Court, SANDERSON, J.:

Action to set aside and cancel certain conveyances, upon the ground that they are clouds upon the title of the plaintiff. The plaintiff had judgment in the Court below, and the defendants have brought the case here upon the judgment roll only.

The only points which we can reach, in view of the shape

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in which the case has come up, are those founded upon the Statute of Limitations, and even those can be reached only through a liberal disregard of technical obstacles.

We consider that the limitation of three years does not apply to an action of this character. It is true that the clouds in question have their inception in fraud; but fraud is not a universal characteristic of the cause of action, and cannot, therefore, be adopted as a test of the true nature of the action, when its position in the various categories presented by the Statute of Limitations comes to be considered. We so held in effect in Hager *v.* Shindler, 29 Cal. 60. The *gravamen* of the action is that the conveyances of which complaint is made, are clouds upon the title, and for that reason, and that only, their cancellation is asked. The right of the plaintiff to his relief does not depend altogether upon the question whether they are tainted with fraud, but upon the fact that they are clouds. Conveyances not tainted with fraud may cloud the true title. Hence fraud is a false quantity when we come to assign an action of this character to its proper class under the Statute of Limitations. If fraud exists, it does so merely as a feature in the case, and not as a test of the true nature of the cause of action within the meaning of the statute.

Whether a cause of action of this character falls under the bar of four years it is unnecessary to say. We held, in Hager *v.* Shindler., that in no event could the statute commence to *run until the execution of the Sheriff's deed. [264] In this case the deed was executed less than four years prior to the commencement of the action.

Counsel for the respondent are mistaken in saying that the action was commenced within three years after the execution of the deed. The transcript shows that it was not, and it is not suggested that the transcript, in that respect, is incorrect. Hence the question as to the limitation of three years is not in terms answered by the case of Hager *v.* Shindler, as counsel assume.

Judgment affirmed.

SAWYER, J., concurring:

I was at first inclined to the opinion that this case fell under

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the fourth clause of the seventeenth section of the Statute of Limitations, under which "an action for relief on the ground of fraud" is barred in three years; but upon further reflection I think it does not. The deeds in question, it is true, had their origin in fraud. The first in order was made with intent to defraud a creditor. The creditor proceeded to obtain his judgment, sell the land, and obtain a Sheriff's deed, regardless of the deed made for the purpose of defrauding him. The fraudulent deed was void as to him—an absolute nullity—and for this reason was not in his way. After obtaining his Sheriff's deed, he was in a position to recover possession of the land, notwithstanding the fraudulent conveyance without first procuring its cancellation in equity. It was only necessary to prove the fraud when the fraudulent deed should be set up in the action at law to recover the possession. (Jackson v. Myers, 18 John. 426.) It might be inconvenient to be at all times ready to make the proof, but in contemplation of law the deed was, as to him, absolutely void. The creditor could protect himself against it at law, and there was no necessity for going into equity for a remedy. The only substantial remedy to him, requiring relief in equity, therefore is, that being upon the record, the void deed is a cloud [265] upon the title of the *creditor and those claiming under him, and this is the real ground of the relief sought in this action. The object sought is only to remove the cloud which casts its shadow upon the title. For these reasons, I think the case not within the bar of three years.

As to the creditor, the fraudulent conveyance was void. Notwithstanding this conveyance, therefore, so far as the rights of the creditor are concerned, the title never passed to the grantee of the debtor until the sale under execution and the making of the Sheriff's deed under which plaintiff claims. Until that time, as to the creditor, the title must be regarded as remaining in the debtor; and his grantee, who participated in the fraud, must be regarded as being in possession with the debtor's assent, and not adversely to the creditor, his right being subject to be divested by a sale under execution against his grantor in favor of the creditor defrauded. For this reason a right of action did not accrue to the purchaser under the

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execution sale as against either till the execution of the Sheriff's deed. I think, therefore, that the action is not barred, and concur in the views expressed in the leading opinion and in the judgment.

F. C. ANDERSON v. JAMES C. PENNIE.

A TRIAL.—A trial is the examination before a competent tribunal, according to the law of the land, of the facts or a question of law put in issue in a cause, for the purpose of determining such issue.

FEES OF JUSTICE IN SAN FRANCISCO.—Where no trial of an action is had, or entered upon, a Justice of the Peace in San Francisco can charge only two dollars for all services rendered, including the entry of a judgment of discontinuance.

IDEM.—If the plaintiff, after the summons is served, and on the return day, without any other proceedings, directs the Justice to enter a judgment of discontinuance, no trial is had or entered upon.

[1] WRIT OF MANDATE TO JUSTICE.—A writ of mandate will issue to compel a Justice of the Peace to enter a judgment of discontinuance.

APPLICATION to the Supreme Court for a writ of mandate.

*The facts are stated in the opinion of the Court. [266]

F. C. Anderson, in *pro per.*, for the Writ.

James C. Pennie, in *pro per.*, Contra.

By the Court, SHAFTER, J.:

Mandamus. The complaint alleges that the defendant is the Justice of the Peace of the Third Township of the city and county of San Francisco. That on the 4th of March, 1867, one James G. Gould commenced an action in said Justice's Court against the relator herein, to recover the sum of eighty-seven dollars and costs of suit. That summons was issued, served, and returned, and that on the return day the plaintiff in said action filed with the said Justice the following order:

"In the Justice's Court of the Third Township in and for the city and county of San Francisco:

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[1] Cited, Tilden v. Sacramento Co., 41 Cal. 77.

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"JAMES G. GOULD v. F. C. ANDERSON.—Entry of judgment on discontinuance.

"James C. Pennie, Esq., Justice of the Peace, Third Township, in and for the city and county of San Francisco—Sir: Please enter judgment of discontinuance and satisfaction in the above entitled case.

"Yours respectfully,
"BUCHAN & WADE,
"Attorneys for Plaintiff.

"San Francisco, March 16th, 1867."

That thereupon the relator, defendant in said action, requested the defendant herein to enter a judgment according to the said order, with which request the defendant refused to comply, unless the relator, or the plaintiff in said action, should pay him the sum of three dollars as his fees for the entry of said judgment; and the said defendant still neglects and refuses to enter the said judgment, except upon compliance with the said unlawful demand. It is further alleged that all the fees due in said action, to wit, the sum of two dollars [267] for *all services required to be performed by the defendant before trial, have been paid to him, and that no other fees are due.

A peremptory mandate is prayed for, directing the defendant to enter the judgment named in the order of Gould. The case has been submitted as on demurrer to the complaint.

The question raised turns upon the construction to be given the fifth section of "An Act to regulate fees in the city and county of San Francisco," approved February 6th, 1866. (Stat. 1865–6, p. 66.) The section is as follows: "The Justices of the Peace, severally, shall be allowed, in any action before them, for all services of every kind whatsoever required to be performed by them before the trial in such action, two dollars; and for the trial and all proceedings subsequent thereto, including all affidavits, swearing witnesses and jury, and the entry of all judgments therein, three dollars; and under no pretext whatever shall said Justices in any one action be authorized or legally entitled to ask, demand, or re-

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ceive any other or further fee or charge, except for copies of papers on appeal, as hereinafter provided."

For the purpose of settling the fees of Justices of the Peace—the subject-matter to which this section relates—actions are distinguished by it into two classes; first, those in which a trial has been had, and second, those in which a trial has not been had. Counsel differ as to what constitutes a trial within the meaning of the section. In our judgment there is no reason for believing that the word is used in a sense differing from the definition universally given to it by law writers, viz., the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. Assuming this definition, we proceed with the argument. In the first class of actions named, that is, actions in which a trial has been had, it will be observed that the interval between the beginning and the ending of the action is divided into two periods; the first reaching from the commencement of the action inclusive, to the trial; the second extending from the trial to the judgment; that is, from the inception of the trial to the perfecting *of the judgment. The amount of judicial ser- [268] vices performed during these respective periods will vary with the circumstances of each particular case; but how great soever these variations may be, matters not; for the compensation has respect to stages of service, rather than to its quality or amount. In this class of actions there is only one thing the presence of which is always essential, and that is, the fact of trial—the inception of which divides the two periods from each other. For the first period the fee is two dollars, which pays for all the service which the period necessarily involves or may chance to involve. For the second period the fee is three dollars, involving nothing necessarily, in our judgment, except a trial commenced; but should the trial be a full one, then involving it with all its incidents and the judgment entered upon the verdict or other decisions.

As to the second class of cases contemplated by the section under consideration, that is, cases where there has been no trial, the rule of the section is, that "under no pretext whatever shall said Justices in any one action be authorized or

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legally entitled to ask, demand, or receive any other or further fee or charge, except for copies of papers on appeal as hereinafter provided." This negative provision is one of the features that distinguish the act of 1866 from the act of April 22, 1858. (Stat. 1858, p. 231.) By the sixth section of that act it is provided that "Justices of the Peace severally shall be allowed in any action before them, for all services required to be performed by them before trial, two dollars. For the trial and subsequent proceedings, including all affidavits, swearing witnesses and jury, and the entry of a final judgment, three dollars." The negative provision referred to must have been purposeless, or else it was added to the section as reproduced in 1866, for the purpose of making it still more manifest that the fee of three dollars could not be claimed except in cases where a trial had either been had or attempted. We say "attempted," for the reason that a Justice is not bound to enter upon the trial of a case except on a payment or tender of the prescribed fee of three dollars.

[269] *Further, if the right to the three dollars does not depend upon the fact of trial, fees to the amount of five dollars may be claimed in all cases; but if that was the intention of the Legislature why was not that sum stated in gross? Why divide it into sums of two and three dollars? and, above all, why make the two dollars payable for services before the happening of an event, and the three dollars payable after the happening of the same event, when the event in a large majority of cases would not be likely to happen at all?

It is ordered that a peremptory mandamus issue according to the prayer of the complaint.

LOUIS M. BEAUDRY v. JOSE M. VALDEZ.

PUBLIC STREETS OF OAKLAND.—The resolutions of the City Council of Oakland to improve the public streets and to accept bids to perform the work need not be approved by the Mayor.

IDEM.—Mecadamizing the streets and curbing the sidewalks are made by statute distinct kinds of improvement in Oakland, and the former does not include the latter.

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[1] CONTRACT TO IMPROVE STREETS IN OAKLAND.—A contract in Oakland to improve a public street is valid only for such improvements as are named in the resolution of intention to improve, passed by the Common Council. If such resolution declares only an intention to macadamize, the contract should not be let for both macadamizing and curbing the sidewalk.

IDEM.—If the contract to improve a street in Oakland includes a kind of work not named in the resolution of intention, the contractor can recover for such work as is named in the resolution, if it can be separated from the other and estimated.

DUTY OF MAYOR OF OAKLAND.—The fact that the Mayor of Oakland, before his election, had become the assignee of a contract for the improvement of a street, as security for a debt due him by the contractor, does not affect the validity of the contract or of the assessment for the work, nor incapacitate him from countersigning the warrant for the collection of the assessment.

IDEM.—The act of the Mayor of Oakland in countersigning a warrant for the collection of an assessment for street improvements is purely ministerial.

[2] APPEAL TO COMMON COUNCIL OF OAKLAND.—If there is any irregularity in the act of the Mayor of Oakland in countersigning a warrant for the collection of an assessment for a street improvement, such irregularity is waived by a failure to appeal from the act of the Mayor to the Common Council.

[2] IDEM.—If there is any irregularity in the demand for the amount of an assessment for a street improvement in Oakland, or any defect in the assessment roll, the same is waived by a failure to appeal to the Common Council.

STREET ASSESSMENT COLLECTABLE IN GOLD COIN.—A tax due for an assessment for improving a street in Oakland, may be assessed upon a gold basis and collected in gold coin. *[270]

JUDGMENT FOR STREET ASSESSMENT IN OAKLAND.—A personal judgment for the amount of an assessment for a street improvement in Oakland should not be rendered against the defendant for a deficiency which may remain due after the enforcement of a lien on the lot.

APPEAL from the District Court, Third Judicial District, Alameda county.

When the plaintiff introduced the assessment roll in evidence, the defendant's attorneys objected to its reception because "it was not made in accordance with the requirements of section eight of 'An Act to authorize the City Council of the city of Oakland to improve the streets, lanes, alleys, courts, and places in said city,' approved April 4th, 1864; that the said pretended assessment does not show the name of the owner of each *lot*, or portions of a *lot;* nor the rate per front foot; nor does the diagram attached thereto show the relative locations of each *distinct lot*, or portion of a *lot*, to the work done; that said diagram of *lots* is not in accordance with the *lots* as known and designated upon the map and books of

[1] Explained, Nicolson P. Co. v. Fay, 35 Cal. 695.

[2] Cited, Shepard v. McNeil, 38 Cal. 75.

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the Assessor of said city; nor such as have been universally recognized since the foundation of said city." The Court overruled the objection. The assessment roll contained several assessments against the defendant for curbing and macadamizing the crossings of different streets, all intersecting Broadway. The following is a copy of one—the others were in the same form:

ASSESSMENT FOR CURBING AND MACADAMIZING THE CROSSING OF BROADWAY AND SIXTH STREETS, AS PER ABOVE CONTRACT.

	Amount.
7,737 square feet of macadamizing, @ 8½c	$657 64
121 4-12 lineal feet of curbs, @ 20c	24 27
	$681 91

NUMBER OF FRONT FEET ASSESSED, 1,000.
RATE PER FRONT FOOT, $0.68191.
Lots numbered and exhibited on the Diagram hereto attached.
All payable in United States gold coin.

[271] *

No.	Names of Owners.	Ft. Ft.	By whom Paid.	Amount.
12	F. Delger	175		$119 33
13	Estate of J. Meyer	125		85 24
14	S. Adler	50		34 09
19	J. M. Valdez	250		170 48
20	Mrs. Stewart	125	Paid by C. Bagge	85 24
21	B. Bee	25	B. Bee paid	17 05
22	J. Stewart	25	Paid by C. Bagge	17 05
48	Estate of J. P. M. Davis	75		51 14
49	B. Bee	50	B. Bee paid	34 09
50	S. Adler	25		17 05
51	R. Smith	25		17 05
52	J. Stewart	25	Paid by C. Bagge	17 05
53	J. Stewart	25	Paid by C. Bagge	17 05
		1000		$681 91

The evidence showed that the land in the city of Oakland was divided into blocks and lots, and that a block fronting on Broadway street was two hundred feet front by three hundred feet deep, and that a lot fronting Broadway street was twenty-five feet front by seventy-five feet deep. The defendant claimed that there was no proof that any demand had been made on him for the amount due on the assessment.

The contract entered into by the City Marshal for performing the work contained the following clause:

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"The work to be done at the following prices, viz.: macadamizing, twenty-two cents per square foot, in legal tenders; curbing, fifty cents per lineal foot, in legal tenders; or macadamizing at eight and a half cents per square foot, in gold coin of the United States of America; for curbing, twenty cents per lineal foot, in gold coin of the United States of America."

The complaint asked for judgment for the amount specified in the contract in gold coin. The Court below gave judgment for plaintiff for the amount specified in the contract in gold coin, to be collected in that kind of money. The defendant appealed.

The other facts are stated in the opinion of the Court

John W. Dwinelle and *W. H. Glascock*, for Appellant.

The resolution of intention authorized the City Council to *macadamize the streets only, but not to curb [272] the sidewalks. Macadamizing does not include curbing. The statute (Stat. 1863–4, p. 333) speaks of macadamizing and curbing as two different things. The term macadamizing could not be nor was it enlarged by parol evidence, because macadamizing having a sense which is generally understood, parol evidence could not be introduced to entirely overturn that general sense, but only to show that it had another special meaning when applied to the transaction in hand. (1 Greenleaf on Ev., p. 363, sec. 280, and notes; 2 Phillips on Ev., 4 Am. Ed., p. 709, and notes.) The warrant issued by the Marshal for the collection of the assessments, and countersigned by the Mayor, was void, because the Mayor was at the time the assignee of the contract for the street improvement. But the countersigning of said warrant by the Mayor was a judicial act, for before so countersigning it he was compelled to "examine the contract, the steps taken previous thereto, and the record of the assessments, and must be satisfied that the proceedings had been fair and legal." (Laws 1863–4, p. 337, sec. 9.) So far then as the Mayor of Oakland, who was interested in this contract, is concerned, whilst it remained in his hands as assignee it was a void contract, or at least suspended *ad interim* in all its action and effect, and no

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official act of his could advance it a single step in the proceedings requisite for its collection. (The Seneca County Bank *v.* Lamb, 26 Barb. 595, and cases cited; Barton *v.* Port Jackson P. Road Co., 17 Barb. 397; Griffiths *v.* Wells, 3 Denio, 226, and cases cited.)

The assessment roll was void, for the reason that it does not show the name of the owner of each lot or portion of a lot, nor the rate per front foot; nor does the diagram attached thereto show the relative locations of each distinct lot or portion of a lot to the work done; that said diagram of lots is not in accordance with the lots known and designated upon the map and books of the Assessor of said city; nor such as have been universally recognized since the foundation of said city. The law regulating these particulars is as follows:

[273] *"After the contractor of any street work has fulfilled his contract to the satisfaction of the Marshal of the said city, or City Council on appeal, the Marshal shall make an assessment to cover the sum due for the work performed and specified in said contract, (including incidental expenses, if any,) in conformity with the provisions of the preceding section, according to the character of the work done, or if any direction and decision shall be given by the said Council on appeal, then in conformity with such direction and decision, which assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with the incidental expenses, if any, the rate per front foot assessed, the amount of each assessment, the name of the owner of *each lot or portion of lot* (if known to the Marshal;) if unknown, the word 'unknown' shall be written opposite *the number of the lot* and the amount assessed thereon, *the number of each lot or portion of a lot* assessed, and shall have attached thereto a diagram exhibiting each street or street-crossing, lane, alley, place, or court on which any work has been done, and showing the *relative location of each distinct lot or portion of a lot* to the work done, numbered to correspond with the numbers in the assessments, and showing the number of feet fronting assessed for said work contracted for and performed."

We know of no law which authorizes a municipal corpora-

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tion to make any discrimination in currency, or to make any contract which on its face shall impose upon the taxpayer or party assessed any pecuniary obligation which cannot be liquidated by payment in the legal currency of the country. But if the contract thus payable in the alternative in two different currencies was legal, then the party whose property was assessed was entitled to the benefit of the alternative, and to pay the assessment in that currency which should be the cheapest to him at the time of payment.

Crane & Boyd, for Respondent.

"The use of the term "macadamized" in the reso- [274] lution of intention, notified the property owners along the line of Broadway street that the Council proposed to contract for the doing of all those things which it was necessary to do, and which are ordinarily done, in order to properly macadamize a street. The resolution of intention is not for the purpose of giving all the *minutiæ* of the proposed improvement, but simply to indicate its general character, so that the property owner may object if he chooses. (Emery *v.* S. F. Gas Co., 28 Cal. 375.) We proved that custom, usage, and common meaning includes in the term "macadamize" curbing also. The object of this proof was not to enlarge the sense of the term, but only to show what it meant and included when applied to the improvement of a street. (2 Pars. on Con. sec. 9, p. 48, and notes.)

If the assessment was erroneously made up, and the appellant here so believed, he should have appealed to the Council. That body had jurisdiction of the subject-matter, and full power to correct the assessment in any particular. His failure to appeal, we claim, estops him now from attacking the assessment in any way. (Stat. 1863–4, p. 339; Charter of Oakland, sec. 11; Emery *v.* Bradford, 29 Cal. 75.) The Mayor was only the assignee of the contract for collateral security, and became such assignee before he became Mayor. In this respect the facts differ from those in the cases cited by appellant. Here the contract in its inception was valid, and when it came to the hands of Ferris, by way of collateral security, it continued valid. It certainly did not become void

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when Ferris became Mayor. The act of the Mayor in countersigning the warrant is ministerial, because it is done not to determine any question as between two parties, but only to satisfy his own judgment whether or not he should countersign the warrant. It is no more judicial than the act of a Notary Public, who, before certifying to the acknowledgment of a deed, must be satisfied that the person is the party named in the deed. (Lynch *v.* Livingston, 2 Seld. 433; McCauley *v.* Brooks, 16 Cal. 41; Middleton *v.* Low, 30 Id. 596.)

[275] If the *assessment roll does not show the name of the owner of each lot, nor the relative location of each lot, it is not void, but only voidable on appeal by the property owner to the Common Council. (Stat. 1863–4, p. 339, sec. 11; Bosworth *v.* Danzien, 25 Cal. 296; Bidleman *v.* Brooks, 28 Id. 72.)

By the Court, SANDERSON, J.:

Action to recover an assessment levied for the improvement of Broadway street, in the city of Oakland.

I. The first point, to the effect that the City Council had not acquired jurisdiction of the subject-matter at the time they ordered Broadway street to be improved, because the resolution of intention had not been presented to or approved by the Mayor of the city, is answered by the case of Taylor *v.* Palmer, 31 Cal. 240. Upon this point the statute under which the city of Oakland works when improving her streets is identical with that under which the city of San Francisco works, and which was before us in Taylor *v.* Palmer. (Stats. 1863–4, p. 333, sec. 3; 1862, p. 392, sec. 4.) In that case, we held that resolutions of intention to improve streets, passed by the Board of Supervisors of the city and county of San Francisco, need not be approved by the Mayor in order to become valid and vest the Board of Supervisors with jurisdiction to order the improvements.

II. The resolution of intention, and the resolution directing the improvement to be made, in terms, only provided for macadamizing the street. The contract for the improvement, and the assessment, both call for macadamizing the street and curbing the sidewalks. The contract price for macadamizing

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was twenty-two cents per square foot in legal tender notes, or eight and a half cents in gold coin of the United States; and for curbing, fifty cents per lineal foot in legal tender notes, or twenty cents in gold coin of the United States. In view of these conditions, it is claimed that the entire proceedings thereby became vitiated, and that no recovery can be had against the defendants.

*To meet the point, testimony was admitted by the [276] Court, on the part of the plaintiff, to show that the word "macadamizing" represented a certain process of street improvement which, *ex vi termini*, included curbing of the sidewalks.

This was error. The question whether the term "macadamizing" also includes "curbing" is settled by the statute under which the parties having the matter in charge were working. The second section prescribes what street improvements the City Council shall have power to cause to be made. Each kind is separately named and described. "Macadamizing" is named as one, and "curbing" as another. Hence, whether the former might or might not, under other circumstances, include the latter, is not the question. Does it, within the meaning of the statute under which the parties were working, is the question; and it is clear that it does not, for they are there mentioned as different and distinct kinds of street work, which circumstance shows that in the sense in which the former term is used in the statute, it does not include the latter.

The passage and publication of the resolution of intention are the acts by which the City Council acquires jurisdiction; and by those acts they acquire jurisdiction to make only such improvements as they describe in the resolution, and they cannot, therefore, lawfully cause work other than that which is described to be performed. But if they do, it does not necessarily follow that the entire proceedings are void. If the work described in the resolution can be separately traced through the entire proceedings, and does not become so mixed up with that which is not specified in the resolution as not to be distinguishable from it, the proceedings are valid as to the former and invalid only as to the latter. In the present case

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the cost of macadamizing and the cost of curbing can be readily distinguished and separated from each other; and we therefore hold that the contract was a valid contract so far as it calls for macadamizing, and invalid only so far as it calls for curbing. (Emery *v.* S. F. Gas Co., 28 Cal. 379.)

III. The point to the effect that the resolution of [277] the City *Council accepting the bid and directing the City Marshal to enter into a contract with the bidder was void because not approved by the Mayor, stands upon the same level with the point made against the validity of the resolution of intention, and admits of the same answer.

IV. It is next claimed that the warrant for the collection of the assessment issued by the Marshal and countersigned by the Mayor, was void because the Mayor was at the time the assignee of the contract, and therefore disqualified from acting in the premises.

The Mayor, prior to his election, had become the assignee of the contract as collateral security for the payment of a note which he held against the contractor for money loaned by the former to the latter to enable him to proceed with the work under the contract. In no other sense was he the assignee of the contract. He had nothing to do with the performance of the work, and under the assignment was only entitled to receive so much of the contract price as would be sufficient to pay his note. The city charter provides that: "No executive officer, nor member of the City Council, nor any officer of the corporation, shall be directly or indirectly interested, nor shall he be security for any person who may be so interested in any contract, work, or business, or the sale of anything whatever, the expense, price, or consideration of which is payable from the city treasury, or by assessment levied under any ordinance of the City Council."

Such are the conditions in view of which the point in hand is made.

The validity of the contract could not be affected by these conditions. The contract was made, and the Mayor's interest in it, such as it was, had vested in him before he became Mayor. The only effect then, in any event, would be to disqualify him from discharging the duties of Mayor so far as

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they might relate to the proceedings under this contract. Doubtless the more regular and proper course, under the circumstances, would have been for the City Council to have elected one of their number to discharge the duties of Mayor *in relation to these proceedings, which they [278] might have done under the fourth section of the city charter, which, among other things, provides that "the Board shall elect a member from their own body to preside at the meetings and to discharge the duties of Mayor whenever there shall be a vacancy in the office of Mayor, or the Mayor shall be absent from the city, or be unable, from sickness or other cause, to attend to the duties of his office." But, be that as it may, we do not regard the act complained of as affecting the validity of the assessment. The act is a mere ministerial duty cast upon the Mayor. It is true that he is required to satisfy himself that the previous steps and proceedings have been fair and legal before countersigning the warrants. But suppose he should fail to do so, would the proceedings or the warrants thereby become worthless in law? As remarked by counsel for respondent, the act is no more judicial than the act of a Notary Public, who, before certifying to the acknowledgment of a deed, must be satisfied that the person making the acknowledgment is the party named in the deed; or of a County Clerk, who, before issuing a writ of attachment, must be satisfied that the affidavit and undertaking are sufficient and in due form; or of the same officer in entering a judgment where the defendant has made default; or of the Governor when he signs an act of the Legislature and is required to see whether the forms of legislation have been observed. (Lynch *v.* Livingston, 2 Selden, 433; McCauley *v.* Brooks, 16 Cal. 11.) But independent of this, we are further of the opinion that the irregularity, if it is such, has been waived by a failure on the part of the defendants to appeal to the City Council as provided in section eleven of the statute. (Emery *v.* Bradford, 29 Cal. 75; Taylor *v.* Palmer, 31 Cal. 240.) If he was prejudiced in any way by reason of the assumed incompetency of the Mayor to act in the premises the City Council could have set the warrant aside and directed another to be made out, and appointed some one of their number to

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look over the previous proceedings and countersign the warrant as Mayor *pro tem.*

[279] *What we have said under this point will also serve as an answer to the points made upon the proof of the demand for the amount of the assessment and upon defects alleged against the assessment roll. The latter could all have been remedied upon an appeal to the City Council, and if the defendant had any fault to find, he should have availed himself of that remedy.

V. The next point relates to the kind of money which the plaintiff is entitled to recover.

The money sued for is a tax due to the city, and the plaintiff sues to recover it as the agent of the city. (Emery *v.* S. F. Gas Co., 28 Cal. 345; Emery *v.* Bradford, 29 Cal. 75; Hendrick *v.* Crowley, 31 Cal. 471.) All taxes and public dues, by express statutory provision, may be collected in coin. (2 Hitt., Arts. 6500–6502.) Hence the City Marshal had lawful authority to levy the assessment upon a gold basis, and to draw his warrant for coin, notwithstanding the contract was in the alternative.

VI. The last point relates to the judgment, which is in the same form as was used in Taylor *v.* Palmer. It was erroneous to render a personal judgment for the deficiency, if any, after a sale of the lots assessed, as we held in that case.

No new trial is necessary, except so far as to ascertain what portion of the amount sued for is for macadamizing the street. This can be ascertained by referring the matter to some competent person to make the computation, for which the assessment furnishes the necessary data. When that is ascertained, the plaintiff will be entitled to a judgment for that amount, and a lien upon the lots assessed, but not a judgment over.

Judgment reversed and cause remanded for further proceedings as suggested in this opinion.

Mr. Justice SHAFTER delivered the following opinion, concurring specially, in which Mr. Justice RHODES concurred:

I concur in the judgment and in all the conclusions arrived at on the points discussed in the opinion of Mr. Jus-

[280] tice *SANDERSON, and, with one exception, I concur

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also in the grounds on which those conclusions are respectively put.

I do not consider that the Marshal's authority to make a gold assessment and to issue a warrant calling for gold had its source in the act of 1864, requiring all dues to the public treasury of the State and of any city or county to be paid exclusively in the gold and silver coin of the United States. None of the dues named in the warrant could get into the municipal treasury, under any circumstances, as a place of lawful deposit. The contractor became and now is the city's agent to collect the assessments; and as fast as collected, the law has and will continue to apply them in his hands in payment of the debt which the city owes him. For this reason, I consider that the act of 1864 has no application to the question. On the other hand, the authority to assess and collect in coin, comes, in my judgment, of the right secured to the city by the contract of paying in currency at one rate, and in gold at a lower rate, in its election. It was lawful for the city to make this contract, and from that fact, I deduce the power to assess and collect in gold.

Mr. Justice SAWYER did not express any opinion.

THE PEOPLE v. AMBROSE WILLIAMS.

INSTRUCTIONS TO JURY.—Strong expressions, and a manifest attempt at coloring favorable to the defendant, in instructions asked by his counsel, in a criminal case, which state the law correctly, may not be regarded as constituting substantial reasons for refusing the instructions.

GIVING AND REFUSING INSTRUCTIONS.—It is better to give an instruction in a criminal case, which in the main states the law correctly, with modifications if required, than to refuse it, although no error may be committed in refusing it.

[1] INSTRUCTIONS SHOULD APPLY TO FACTS.—It is not error for the Court to refuse an instruction, in a criminal case, which is not pertinent to the facts of the case.

INSTRUCTIONS AS TO REASONABLE DOUBT.—If, on a trial for murder, the fact of the killing is admitted, and the defence rests on the question of the grade of the offence, or whether the defendant was justified in killing on the ground of self-defence, instructions on his behalf on the question of reasonable doubt, framed so broad as to include the fact of killing, are not pertinent, and should be refused.

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[1] Cited, People v. Best, 39 Cal. 691.

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[281] *IDEM.—Instructions in such a case, upon the question of reasonable doubt, should apply only to the grade of the offence and the fact of justification.

[1] GIVING SAME INSTRUCTION TWICE.—If the Court has already given the law correctly to the jury upon a given point, it is not error to refuse a second instruction upon the same point.

JUSTIFICATION IN KILLING.—On a trial for murder the Court should not instruct the jury that the defendant was justified if he was in danger of being killed by the deceased and understood and feared such danger; but that he was justified if the circumstances were such as to excite the fears of a reasonable being, and that he acted under the influence of such fears, and not in a spirit of revenge.

[2] RULES OF COURT.—A rule of Court which requires each counsel to submit such instructions as he intents to ask, to the opposite counsel, before his final argument, under the penalty of having the same refused, may in many cases work injustice if strictly adhered to.

RULES OF COURT AS TO INSTRUCTIONS.—Instructions upon a material point in a criminal case should not be refused because not submitted to the opposing counsel before his final argument, in obedience to a rule of Court requiring it to be done.

COURT MAY CONTROL ITS RULES.—Rules adopted by a Court are always under its control, and if there is any reason to apprehend that they will work injustice if strictly adhered to, they should be made to yield to the superior calls of justice.

INSTRUCTIONS AS TO VENUE OF CRIME.—If there is no conflict in the testimony as to the venue of the crime for which the defendant is on trial, instructions upon the subject are out of place.

REPELLING ASSAULT.—In repelling an assault, the person assailed should use no more force than is absolutely necessary.

MODIFYING INSTRUCTIONS.—The Court may modify instructions asked by counsel before giving them.

APPEAL from the District Court, Tenth Judicial District, Sierra county.

The defendant was indicted for killing one Samuel R. Eddy, at the county of Sierra, on the 4th day of July, 1866. He was sentenced to the State Prison by the Court, and appealed.

The other facts are stated in the opinion of the Court.

James A. Johnson, for Appellant.

The Court should have given the instruction on the question of reasonable doubt asked by the defendant's counsel. (People *v.* Milgate, 5 Cal. 130; People *v.* March, 6 Id. 544; People *v.* Arnold, 15 Id. 478; People *v.* Gibson, 17 Id. 284; People *v.* Eckert, 19 Id. 603.) The question of reasonable doubt should apply to the whole case—to the killing as

[1] Cited, People v. Lachanais, post 433.

[2] Cited, Life Ins. Co. v. Francisco, 17 Wall. 679.

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well as the justification. (2 Lead. Cr. Cas. by Bennett *& Heard, 536.) The defendant is to be held in- [282]
nocent until proved guilty. It cannot therefore be wrong for the Court to charge that if there is a reasonable doubt of his guilt, he should be acquitted.

Creed Haymond, also for Appellant.

A defendant is presumed innocent until his guilt is established, and if there is reasonable doubt of his guilt, should be acquitted. If it is said that when the killing is proved, doubt does not apply to it, I answer that the prosecution may prove justifying circumstances. It is not the province of the Court to say that the killing is proved, and refuse an instruction on the question of reasonable doubt on that ground. (Commonwealth *v.* McKie, 1 Gray, 61.)

Attorney-General, for the People.

If the instruction given by the Court on the question of reasonable doubt was not sufficiently specific, the defendant's counsel should have asked a more specific one. (People *v.* Byrnes, 30 Cal. 206.) The first instruction refused contains both good and bad law. It was not the duty of the Court to sift the good from the bad. Its terms were too broad. The killing was admitted, and the Court is asked to apply the question of reasonable doubt to this admitted fact. (People *v.* Cauffman, 24 Cal. 230; Case of Webster, 5 Cush. 320; 1 Whar. Cr. Law, sec. 709.)

By the Court, SANDERSON, J.:

The defendant was indicted for murder, tried, and convicted of manslaughter.

The exceptions taken at the trial all relate to the action of the Court in giving and refusing instructions.

I. The defendant asked the Court to give the following instruction:

"A wide distinction exists between civil and criminal cases *in respect to the degree or quantity of evi- [283]
dence necessary to justify the jury in finding a verdict for the Government. In civil cases their duty is to weigh the

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evidence carefully and find for the party in whose favor the evidence preponderates, although it be not free fron reasonable doubt. But in criminal cases it is far different; the party accused is always entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in favor of the accused. It is therefore a rule of criminal law that the guilt of the accused must be fully proven. The burden of proof is upon the prosecution. All presumptions are in favor of innocence, and every person accused of crime is presumed to be innocent until he is proved guilty. If, upon such proof, there is a reasonable doubt remaining, the accused must be acquitted. For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. It is not enough that the evidence goes to show the guilt of the accused: it must go further, and must be inconsistent with the reasonable supposition of his innocence, or you are bound to acquit the prisoner, in subserviency to that humane maxim of law which, clothed in the language of that good and great Judge, Lord Hale, declares that 'it is always better to err in acquitting than in punishing—on the side of mercy than on the side of justice.'"

This was refused, on the ground that it had already been given so far as applicable to the case.

The language is mainly copied from Webster's Case, 5 Cush. 320, and aside from a manifest attempt at coloring favorable to the defendant, states the law correctly. "A wide distinction" and "it is far different" are rather strong expressions, and are evidently employed with a view to impress the [284] minds *of the jury with an exaggerated notion of the distinction between civil and criminal cases in the respect named. So on the question of presumption as to the innocence of the accused, an important qualification, limiting them to such as do not arise upon the evidence in the case,

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employed by Mr. Chief Justice Shaw in Webster's Case, 5 Cush. 386, is omitted. These matters of difference, however, may not arise above the level of criticism, and may not, therefore, be regarded as constituting substantial reasons for holding that no error was committed in refusing the instruction. There are more satisfactory grounds upon which the ruling of the Court can be sustained.

Doubtless, all things considered, it would have been better to have given the instruction, with some slight modifications; for while, as we shall presently see, it was not error to refuse it, all pretence for an appeal would have been so far removed, and no harm done to the case made by the prosecution. Where such is the case, it is always better to give the instruction.

We think the ruling of the Court must be sustained, upon the ground that the instruction as a whole, was not pertinent to the case made by the evidence, and that so far as it was pertinent, it had already in the main been given to the jury.

The matter of the instruction, so far as it is taken from the charge of Mr. Chief Justice Shaw in Webster's Case, had no useful application. Webster's Case rested entirely upon circumstantial evidence, and the rules there given for the guidance of the jury were therefore demanded by the exigencies of the case; but in this case the homicide was committed in the immediate presence and view of the witnesses. That the defendant committed the homicide, admitted of no doubt whatever. It was the result of a personal encounter, and the defendant himself, while on the witness stand, admitted the killing. Such being the case, the only questions for the jury were, first, whether the defendant was justified in killing the deceased on the score of self-defence; and second, if not, what was the grade of the offence—murder of the first or second degree, or manslaughter? In view of these conditions, an instruction upon the question of reasonable doubt, framed *so broad as to include the fact of the killing, was en- [285] tirely out of place, and could have served no proper purpose. If of any effect whatever, it would have been so far mischievous because tending to mislead by diverting the minds of the jury from the true points of controversy. The jury had already been instructed upon the question of reason-

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able doubt as applicable to the grade of the homicide. The Court did not, in its instruction upon that question, in terms, include the fact of justification, it is true; but if counsel desired a more specific application of the principle to the latter fact, if allowable, (a question not involved here because no such application was requested,) they should have asked an instruction directly upon that point. (People v. Byrnes, 30 Cal. 206.)

II. It is next claimed that the Court erred in refusing to instruct the jury as follows:

"If you believe the defendant was in danger of being killed or receiving great bodily harm at the hands of the deceased, and that the defendant understood such danger and feared it, then, in that case, he was justifiable in killing deceased; and in considering the question whether he was in danger and whether he understood and feared such danger, you should consider and weigh the evidence in relation to the character of the deceased, also the evidence in regard to the threats of deceased made against defendant, and, in fact, should consider every circumstance connected with the unfortunate altercation which ended in Eddy's death."

This instruction was properly refused, for two reasons—first, the rule upon the subject to which it was addressed had already been stated by the Court in the precise language of the statute, which it is difficult to improve (Act concerning crimes, secs. 30 and 31); and second, because it misrepresents the law. It makes the bare fear of the defendant, and not the fears of a reasonable person under circumstances sufficient to excite them, the test of justification, and that, too, unaccompanied by the further and indispensable qualification that he *acted under the influence of such fears and not in a spirit of revenge.

[286]

III. It is next claimed that the Court erred in refusing to instruct the jury upon the question of venue, as asked by the defence.

The Court refused to give the instruction, on the ground that it was not presented in time, under a rule of the Court which requires counsel having the opening of the argument to submit such instructions as he may intend to ask to oppo-

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site counsel, in advance of the argument of the latter, and requires counsel having the reply to submit his in advance of the closing argument of the other side.

Had there been any plausible ground for an instruction upon the question of venue, we should feel inclined to hold that the Court erred in refusing to give the instruction which was requested upon that subject. A Court may undoubtedly regulate the order of its business by rules which do not conflict with law or do not impair the legal rights of parties; but it may be well doubted whether a rule of the character of the one under review may not in many cases work injustice if strictly adhered to. Independent of rules, a party would have a right to submit his instructions at any time before the jury leave the box. Counsel are better advised after hearing the argument than they can be before, and are therefore better prepared to frame their instructions at the close of the argument than at any previous stage of the trial. Counsel have a right to shape their instructions so as ro rebut the theories of the other side as well as advance their own, and it may sometimes happen that they cannot do this to their entire satisfaction until after such theories have been fully presented; and it may therefore well be doubted, under all the circumstances, whether a rule which requires counsel to submit their instructions in advance of the argument, or while it is in progress, if it is to be strictly adhered to, has anything to recommend it. It is true that certain general instructions, involving matters of definition and the like, can be readily prepared before the argument, but the more valuable and useful part of the *charge—that which deals directly with [287] the particular facts of the case and the opposing theories of counsel—cannot; besides, the former is generally prepared and given by the Court of its own motion, while the latter receives, or should receive, the especial attention of counsel. It will rarely fail to happen that subjects for instruction, not previously thought of, will be suggested or occur to counsel pending the argument or after its close; and as one of the objects of giving instructions is to present the law of the case fully, and not partially, it would hardly be consistent with that object to reject matters of perhaps vital

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importance merely because they did not occur to counsel at or before a given stage in the proceedings, and if such was the case here we should feel inclined to hold it error, as being an abuse of discretion. Rules of Court should be framed in furtherance of justice; but they may sometimes, if strictly adhered to, work the other way. They are always under the control of the Court, and if there is any reason to apprehend the latter result, they should be made to yield to the superior calls of justice.

But we are of the opinion that there was no substantial ground for the instruction in question, and that it was therefore properly refused. There was no contest over the question of venue, and although the testimony on that point was not as direct and explicit as it generally is, it was nevertheless ample and sufficient, especially in view of the fact that the defence offered no evidence and made no contest. The testimony of several witnesses was to the effect that the homicide was committed at "Minnesota," and the Coroner testified that he "held an inquest on the body of the deceased in this county, at Minnesota." This proved the venue sufficiently, and in the absence of any conflicting testimony there was no occasion for any instruction upon that question.

IV. It is next claimed that the Court erred in using the following language while instructing the jury upon the law of self-defence: "The law carefully measures the amount of force which may be used in repelling an assault, and allows no more than is absolutely necessary."

[288] *The point is made against the word "absolutely," and is sufficiently answered by the thirty-first section of the act concerning crimes, where the precise word is used in the same connection in which it was employed by the Court.

V. The point to the effect that the Court erred in modifying an instruction asked on the part of the defendant before giving it is answered by Boyce *v.* California Stage Co., 25 Cal. 460; People *v.* Dodge, 30 Cal. 448.

The order denying a new trial is affirmed.

SAWYER, J., concurring specially:

I concur in the judgment upon the other grounds stated in

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the opinion of my associate, but I dissent from that portion of the opinion which questions the power of the District Court to establish a rule of practice requiring instructions asked by counsel to be handed to the Court for examination before the close of the argument. In some of the District Courts, and probably in most of them, such a rule has been adopted and in force for many years. After some experience as a District Judge, I am satisfied that such a rule is salutary. The Judge in criminal cases is required to reduce his charge to writing, and this must ordinarily be done during the argument of counsel before the jury. It is a great inconvenience to have a long list of instructions kept quietly in the pockets of counsel during the argument handed up to the Judge at the last moment, after his own charge has been written, to be hastily examined and passed upon. It is impossible for a Judge under such circumstances, with an impatient jury and audience waiting for him, to calmly and properly consider and pass upon the instructions. Great liability to err, besides an obstruction to the business of the Court, would almost necessarily result. If counsel have properly prepared their case, there can be little difficulty in preparing all necessary instructions beforehand, and much better than during the excitement of the argument. If the points of the case are not discovered till the close or near the close of the argument, it is not very *likely that instructions will be prepared upon [289] the spur of the moment with that care and precision which the occasion demands. I see no sound objection to a rule requiring counsel to present to the Court instructions which they propose to ask before the argument to the jury. The tendency of such a rule would be to obviate errors—a tendency, perhaps, not always desired by defendants in criminal cases. Our predecessors were of opinion that it was competent for Courts to adopt such a rule. (People *v.* Sears, 18 Cal. 635. See also Anderson *v.* Parker, 6 Cal. 201; Tinney *v.* Endicott, 5 Id. 102; People *v.* Tock Chew, 6 Id. 636.)

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JACOB A. MORENHOUT et als. v. VALENTIN HIGUERA et als.

ISSUES IN PARTITION.—If, between the parties to an action for partition, disputes exist as to their rights or interests in any respect, such disputes may be litigated and determined.

[1] JUDGMENT IN PARTITION.—A judgment in an action for partition is binding and conclusive as to title upon all the parties who are served with summons or appear, and a bar to a new action.

IDEM.—If the complaint in partition avers that a defendant has, or claims to have, some interest in the land, which interest is unknown to plaintiff, and a summons is served on such defendant, and he fails to appear, and the judgment does not give such defendant any interest, it is *res adjudicata*, and estops him from recovering in a new action.

IDEM.—The effect of a judgment in partition is to be determined by our statute, and not by the common law.

APPEAL from the District Court, Third Judicial District, Monterey county.

The plaintiffs appealed.

The other facts are stated in the opinion of the Court.

B. S. Brooks, for Appellants.

If the plaintiff, Scott, had made this allegation in his complaint, that defendants had no interest in the land, it would have rendered it demurrable as to them; for he could [290] not *maintain an action for partition with them, unless they were his tenants in common. A denial of their title would have been a disseizin, and a disseizin was a bar to the action. If the title is in dispute, a court of equity will not make a decree for partition, but will remit the parties to an action at law to determine the title. (Wilkin *v.* Wilkin, 1 Johns. Ch. 117.) "Partition is a matter of right if the title is clear, but not otherwise. If the title be suspicious, a court of equity, as the Vice-Chancellor observed in Baring *v.* Nash, 1 Ves. & B. 557, may well pause in directing partition." (Phelps *v.* Green, 3 Johns. Ch. 305; Bradshaw *v.* Calligan, 5 Johns. 82.) Two things are essential to the maintenance of

[1] Approved, Bollo v. Navarro, 33 Cal. 465, 468. Cited, Gates v. Salmon, 35 Cal. 598.

[2] Cited, Sutter v. San Francisco, 36 Cal. 116; Senter v. De Bernal, 38 Cal. 642.

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the action—privity of possession and privity of estate. The plaintiff must allege that the defendants are in joint or common possession with him, and that they are rightfully so. Unless he admits or charges them to be joint tenants or tenants in common with him, he has no right to make them parties to the partition suit. There was no allegation to support the decree. There was no allegation in the complaint nor in the answers of any of the defendants that the claim of the defendants Morenhout, Bernal, and Crowley, was unfounded. On the contrary, the only allegations which can be construed as touching that point, were exactly the reverse. The plaintiff alleged that he, "*together with the defendants, is seized of an estate in fee as tenant in common.*" "The said José de Jesus Bernal, Valentin Higuera, Jacob A. Morenhout, and Emma Morenhout, claim to have, as the plaintiff is informed and believes, some interest in the said premises under the grant hereinbefore mentioned and derived through some of the heirs of the said José Higuera, the extent of which said interest is unknown to the plaintiff." The complaint alleged the grant to José Higuera, and claimed under him a small undivided interest. There was no denial of the conveyance from the heirs of Higuera, under which those defendants claim—no allegation that their claims were unfounded; nor was there in any of the answers of the other defendants. There was, then, no allegation in the complaint to support the judgment in *partition. (Biddle Boggs *v.* [291] Merced M. Co., 14 Cal. 356; Raun *v.* Reynolds, 11 Id. 19; Bradley *v.* Harkness, 27 Id. 76.)

S. O. Houghton, for Respondents.

The judgment in partition was unquestionably admissible as evidence, and the true question was its effect as evidence, whether the decree in that case was a bar to this action or not. This question must be determined from the face of the record. Joseph Scott, the plaintiff in the partition suit, was a tenant in common of the Rancho Tularcitos, the land which was the subject of the action in that suit. Scott was in possession, and therefore entitled to maintain the suit. (Pr. Act, 264.) The averment in the complaint as to the defend-

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ants in question is, that the defendants, José Jesus Bernal, Carmen Sibrian de Bernal, Valentin Higuera, Jacob A. Morenhout, and Emma Morenhout, "*claim to have*" some interest in the premises described in the complaint under the common source of title—the grant to José Higuera—"*the extent of which interest*" is unknown to the plaintiff; and he therefore asks that they be required to establish by proof their respective interests therein. That allegation, instead of showing an adverse claim, shows that the defendants in question *claim to have* some interest in the estate under the same title under which the plaintiffs claim, and nothing more. If, however, they were not proper parties, they should have appeared in the partition proceedings, and made the objection either by demurrer or answer. The fact that they were improperly joined as defendants does not impair or affect the validity of the decree. There is nothing in the record to show what the particular nature of the claim of the defendants, Morenhouts and the Bernals, was in the premises. Their alleged claim may have been a mortgage of record, satisfied in fact, but not satisfied of record. They may have claimed some interest of some heir of the grantee of the rancho, José Higuera, (the common source of title of all parties,) while some other of the parties held that interest under a prior deed, or they may have claimed to have some interest of some other nature.

[292] *Whatever their claim was to the premises, was one of the questions presented by the pleadings. It was one of the issues in the case, and was passed upon by the Court. The purpose of the action was to determine who among the persons who claimed to be co-tenants in the rancho were so in fact, and what their respective interests were. It would seem strange that if the Court had power to adjudge that one, who claimed to be a tenant in common of a certain interest, owned a lesser or a greater interest than he claimed, could not also determine, if such was the fact, that although a party claimed an interest as a tenant in common that he was not so in fact, and that his claim was unfounded.

By the Court, SANDERSON, J.:

Ejectment. The plaintiffs allege title to an undivided half

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of the "Plain of San Ignacio," parcel of the Rancho "Los Tularcitos," in Santa Clara county, which was granted to José Higuera, now deceased, by the Mexican Government.

The defendants deny the title of the plaintiffs, and allege title in themselves. They also plead in bar a former judgment of the Court in another action, to which plaintiffs and defendants were parties, in which it was adjudged and determined that the plaintiffs had no title to the premises.

At the trial, the plaintiffs made a case which entitled them to recover, and rested. The defendants then offered in evidence the judgment roll in the suit of Scott *v.* Higuera et al. in support of their plea in bar, to which objection was made by the plaintiffs, upon the ground that it was irrelevant and incompetent.

Both parties claim title under the Mexican grant to José Higuera. The suit of Scott *v.* Higuera was for a partition of the Rancho Tularcitos y San Ignacio, instituted by Scott against Higuera and others, among whom were the plaintiffs to this action. All parties claimed under the Higuera title. The plaintiffs were personally served with summons, but never appeared. As against them the allegation of the complaint *was, in substance, that they had or claimed to [293] have some interest in the rancho under the Mexican grant to Higuera, which was unknown to the plaintiff; and he therefore asked that they might be required to show what their interest was, and establish the same by proof. The defendants who answered to the partition suit set up and claimed interests in the rancho, which, together with that of the plaintiff, covered the whole thereof, and united with the plaintiff in asking for a partition. The Court adjudged that the plaintiffs in this case had no interest, and partitioned the rancho among the other parties according to their interests. The whole case turns upon the question whether the judgment in Scott *v.* Higuera is conclusive against the plaintiffs' title and right to recover. The Court below held that it was, and rendered judgment for the defendants.

It is contended on the part of the appellants that the judgment in Scott *v.* Higuera does not estop the plaintiffs from setting up their title, and that it is not evidence against them

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or their title. And in support of this view, it is argued—first, that an action for a partition has a special purpose, to wit: the division of land among tenants in common, etc., and that nothing else can be done; that the titles or interests of the tenants cannot be litigated and determined; that if anything of that character has to be done, it must be done elsewhere. Second, that if this can be done in an action for partition, it was not done in this case; that no issue as to the title or interest of the plaintiffs was made and no trial was had, and that therefore the decision of the Court that they had no title has nothing to support it, and is therefore *coram non judice*. That if Scott desired to try and determine the plaintiffs' title he should have tendered an issue in his complaint upon that subject, but that he did not, and hence there was no such issue in the case, and hence upon the general principles upon which the doctrine of *res adjudicata* rests, the judgment of the Court that the plaintiffs had no title is no bar.

In support of the first of these points the learned counsel for the appellants has filed a very able brief, which [294] would be *entitled to much weight in a jurisdiction where the distinctiont between actions at law and suits in equity are still preserved; but unfortunately for the argument, those distinctions have been abolished in this State, and a party who here seeks relief at the hands of the Courts may obtain both legal and equitable relief in the same action or proceeding, if upon the facts of his case he is entitled to both. Actions for partition of land constitute no exception to this rule. If, between the parties to an action for partition, disputes exist as to their rights or interests in any respect, such disputes may be litigated and determined in such action. "The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried, and determined by such action," is the express language of the statute by which proceedings in partition are regulated. (Sec. 271.) The point is too plain for argument. Moreover, it has been expressly decided by this Court. (De Uprey *v.* De Uprey, 27 Cal. 335.) We there said: "Any question affecting the right of the plaintiff to a partition, or the right of each and all of the parties in the land, may be put in issue, tried, and determined in such

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action. Such is one of the fruits of the new system of practice which we have adopted."

The second point is founded upon a mistaken notion as to the averments and prayer of the complaint. The complaint avers that the appellants have, or claim to have, some interest in the land of which partition is sought, the character and extent of which is unknown to the plaintiff, and prays that they may be required to come into Court and exhibit and establish the same by proof. It is true that the plaintiff in an action for partition is required to set forth in the complaint specifically and particularly the respective interests of all parties, whether such parties be known or unknown to him, so far as such interests are known to him (sec. 265;) but it would be idle to require him to set forth specifically interests of the character and extent of which he is ignorant. As to such interests he can only make the general and indefinite allegation which was made in this case, and such an allegation *is sufficient to tender an issue and cast upon [295] the parties against whom it is directed the duty of coming into Court, if served with summons, and setting forth their interests, under penalty of being adjudged to have none.

An action for partition under our statute is, to some extent, *sui generis*. The parties named in the complaint, whether as plaintiffs or defendants, are all actors, each representing his own interest. Whether plaintiffs or defendants, they are required to set forth fully and particularly the origin, nature, and extent of their respective interests in the property. (Secs. 265, 270.) This having been done, the interest of each, or all, may be put in issue by the others; and if so, such issues are to be first tried and determined (sec. 27), and no partition can be made until the respective interests of all the parties have been ascertained and settled by a trial. That they may thus litigate their respective interests is further shown by section three hundred and eight, where it is provided that the costs of such litigation as may arise shall be charged only against the parties who make the issues which are tried.

That the judgment in Scott v. Higuera et al. is conclusive against the right of the plaintiffs to recover in this case is therefore too plain for argument. We find it unnecessary to

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notice the argument of counsel for the plaintiffs as to the force and effect of a former judgment between the same parties and their privies at common law. To do so, in the presence of the plain and positive provisions of the statute by which the whole matter is regulated, which require no reference to the common law for the purposes of interpretation, would be to go aside and discuss principles which have no direct application to the case. The force and effect of a final judgment in an action for partition is clearly and explicitly stated in the statute (sec. 278.) Such a judgment is declared to be binding and conclusive forever upon all persons who are named in the complaint as parties to the action and have been served with a summons, and their legal representatives. The plaintiffs having been named in the complaint as parties to the action, and having been served with a summons, the Court [296] acquired *jurisdiction to first ascertain and determine what interests they held, if any, in the land, and then to divide it accordingly. To say that the judgment is not conclusive upon them because they neglected to appear and exhibit their interests is preposterous. Such a doctrine would place it in the power of an obstinate tenant to defeat and prevent a partition in all cases by merely staying out of Court. They were made parties and had an opportunity to appear and take part in the proceedings. Their default was a confession that they had no interest in the land, and the Court had jurisdiction to so adjudge expressly. But had it not done so, and passed them in silence, the result would have been the same, for a judgment that the land belonged to the parties between whom it was divided, would have been equally as conclusive against their title, they having been made parties and served with process. The former judgment of a Court having jurisdiction of the subject-matter and the parties, at common law, is not only conclusive as to the matters which were actually tried and determined, but also as to other matters which they might have litigated and might have had determined. (Gray *v.* Dougherty, 25 Cal. 266.) Much more is it under the statute in relation to partition. The plaintiffs could have had their rights to this land litigated and determined in the partition suit, in the sense contended

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for by their counsel; and not having done so, they are as much bound by the judgment as if they had.

Judgment and order affirmed.

THE PEOPLE ex rel. E. R. GALVIN v. CALEB DORSEY.

ELIGIBILITY TO OFFICE OF DISTRICT ATTORNEY.—There is nothing in the Constitution or laws of this State, nor is there any usage or custom which requires that a license to practice law from the Supreme, or any other Court, must be obtained before a person can become eligible to the office of District Attorney.

APPEAL from the District Court, Fifth Judicial District, Tuolumne county.

*At the general election held in Tuolumne county, [297] in September, 1863, Caleb Dorsey was elected District Attorney of said county for the term of two years, and duly qualified and entered upon the discharge of the duties of the office. Dorsey was licensed to practice as an attorney and counsellor of the Supreme Court. At the general election held in said county in September, 1865, the relator, Galvin, was elected District Attorney of said county for the term of two years, to commence on the first Monday in March, 1866. Galvin duly qualified and demanded possession of the office, but Dorsey refused to deliver up to him possession of the same. On the 2d day of June, 1866, this action was commenced to obtain possession of the office. Dorsey set up in his answer as a defence, that Galvin at the time he was elected and qualified, and his term of office commenced, was not licensed to practice as an attorney in any of the Courts of this State, and that therefore he was not entitled to exercise or enjoy the office. The answer also averred that Galvin was not admitted to the Supreme Court until April, 1866. The plaintiff demurred to the answer, and the demurrer was sustained by the Court below. Defendant declined to amend, and judgment was rendered against him by default. Defendant appealed from the judgment.

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H. P. Barber, for Appellant.

The relator at the time of his election was constitutionally ineligible, not having been admitted as an attorney in any court of this State, and being so, his election was a nullity. (Patterson *v.* Miller, 2 Met. Ky. 493.) The Const., Art. VI., sec. ten, provides that "the Legislature shall provide for the election of District Attorneys, and shall fix by law their duties," etc. The Legislature has allotted to these officers certain duties which can only be performed by a licensed attorney. (Stat. 1850, p. 112, sec. 3.) The question has
[298] been expressly decided. (See People ex rel. *Hughes *v.* May, 3 Mich, 598. See also McKean *v.* Devries, 3 Barb. 196; Ray *v.* Harley, 1 Duer, 637.)

Coffroth & Spaulding, for Respondent.

The office of District Attorney is a constitutional office. "The Legislature shall provide for the election of * * * County Clerks, District Attorneys, Sheriffs, and other necessary officers, and shall fix *by law* their duties and compensation." (Const., Art. VI., sec. 11.) Hitt. Dig., Article two thousand three hundred and ninety-six, section one, contains the law which the Legislature "fixed" for the regulation of the "duties and compensation" of District Attorneys:

"Sec. 1. There shall be a District Attorney in each county of this State, who shall be elected by the electors of the county," etc.

"Sec. 2. * * * He shall execute and file with the Clerk a bond to the State," etc.

"Sec. 3. He 'shall be the public prosecutor' in each county."

"Sec. 5. If he fails to attend any term of those Courts, the Court shall designate *some other person* to perform the duties of District Attorney during his absence from the Court, who shall receive a reasonable compensation, to be certified by the Court, and paid from the county treasury."

No qualification is named or authorized. Any citizen of competent age to exercise civil and political functions is eli-

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gible. The whole spirit and tendency of our Constitution is to open all civil and political rights and privileges to all citizens. *To be a citizen*, is to be qualified for the enjoyment of any right or privilege under our State Government. There is no exception to this, unless a fixed time of residence, in one or two instances, be deemed such. It is not in the power of the Legislature or judiciary to establish arbitrary exclusions from office where the Constitution has not. (Barker *v.* People, 3 Cow. 703; Page *v.* Hardin, 8 B. Mon. 660.)

**Barber*, in reply. [299]

The *Constitution* provides for the election of a "District Attorney." Now, *at the time of the adoption of the Constitution*, what was the *then understood* meaning of the words "District Attorney?" The answer is palpable that an *attorney at law* was meant; for if not, why in an act passed but a few months afterwards, in regard to the constitutional office of District Attorney, was it provided, that in case of his absence the Court should appoint some other *attorney?* This was to be done also in case of his being "employed as counsel"—how could he be employed as *counsel* unless he was an attorney at *law?* The word "attorney," when not coupled with any qualifying phrase, means "attorney at law." (Clark *v.* Morse, 16 La. 575; 1 Blacks. 26; 2 John. Cas. 102; 8 Barb. 355.)

By the Court, SANDERSON, J.:

There is nothing in the Constitution or laws of this State which requires that a license to practice law from this or any other Court must have been obtained before a person can become eligible to the office of Distrit Attorney. The Constitution merely directs that the Legislature shall provide for the election, among other officers, of District Attorneys, without declaring what qualifications shall be required of them. (Art. VI., sec. 11.) Nor is there anything in the existing legislation of this State which makes a license to practice law a condition to the right of any person to hold that office. (Stat. 1851, p. 187; 1863, p. 95.) The first act which was passed in relation to the office of District Attorney contained an expression which may possibly give some color to the theory of the

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appellant, that, in the judgment of the first Legislature, the office should be filled only by licensed attorneys. It provided that, in the absence of the District Attorney, or in the event of his being disqualified in any case, the Court should appoint "some other attorney" to perform his duties. (Stat. [300] 1850, *p. 113, sec. 3.) The most that can be claimed for that provision is, that it implied that none but licensed attorneys should hold the office. Admit this to be so: in the subsequent act, passed in 1851, this expression was amended so as to read "some other person," thus doing away with the implication, if any, to which the former language might have given rise. (Stat. 1851, p. 187, sec. 5.) To limit the performance of the duties of the office to licensed attorneys would undoubtedly be wise and politic if there is any danger of incompetent persons seeking and obtaining it. Not more so, however, than in the case of the Justices of this Court, or the Judges of the District and County Courts; yet neither the Constitution nor the Judiciary Act provides that the Justices of this Court, or the Judges of the District and County Courts shall be licensed attorneys. The Constitution is silent upon the subject. The Judiciary Act merely requires that the Justices of this Court shall have been citizens of the United States and residents of this State for two years next preceding their election—nothing being said about their being licensed attorneys. (Stat. 1863, p. 333.)

We have carefully examined the case of People ex rel. Hughes *v.* May, 3 Mich. 598, upon which the appellant relies. To us the reasoning of the Court is not at all satisfactory, notwithstanding there is no substantial difference between the Constitution and statute of Michigan and our own. In the Constitution of Michigan the words "Prosecuting Attorney" are used to designate the office. The Court found in this designation a limitation, on the question of eligibility, to licensed attorneys. Undoubtedly this designation indicates to some extent the character of the duties which belong to the office, but how can it be claimed that it indicates, much more prescribes, the qualifications of the officer? The Court seems to have confounded the two. The Constitution makes no provision for licensing attorneys, but leaves that matter en-

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tirely to the discretion of the Legislature, or perhaps, in the absence of any action on the part of that body, to the Courts. Suppose the Legislature had passed no law providing for the *licensing of attorneys, or had passed a law, as [301] they undoubtedly might have done, allowing everybody to practice law, according to the Supreme Court of Michigan, what would become of the office of District Attorney? In the event first supposed, there would be no licensed attorneys, and therefore, according to their doctrine, nobody eligible to the office of Prosecuting Atrorney. In the latter event, it might be claimed that everybody would be a licensed attorney, and therefore everybody would be eligible to the office of District Attorney. These results are possible, and therefore demonstrate the fact that the framers of the Constitution could not have intended what that Court determined that they did. It would be going a great way beyond any rules of construction with which we are acquainted to hold that a mere name given to an office *ex proprio vigore* defines also the qualifications of the officer. Under such a doctrine, no one but a surveyor would be eligible to the office of Surveyor-General, no one but a printer would be eligible to the office of State Printer, no one but a pedagogue would be eligible to the office of Superintendent of Public Instruction, and no one but a bibliomaniac would be eligible to the office of State Librarian. To so hold would be to accord more meaning to a name than was accorded by Juliet, and to afford a new test of official qualifications.

But independent of this, it is absurd to claim that the framers of the Constitution were careful to provide that no one but a licensed attorney should hold the inferior office of District Attorney, while they made no such provision in regard to the highest judicial officers named in the Constitution. It is not provided that Judges shall be lawyers even, much less licensed attorneys. A man's fitness for Judge or District Attorney does not depend in any just sense, nor is it made to depend, upon his being a licensed attorney. Nor is there, in a legal sense, any force in the idea that Judges and District Attorneys must be lawyers, much less licensed lawyers. The earlier Chancellors of England were ecclesiastics,

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not lawyers. Many members of the High Court of
[302] Parliament *are not lawyers, much less licensed attorneys. So of the Court of Errors, which was once the Court of last resort in the State of New York. So of the earlier Judges of New Hampshire. Chief Justice Ware was a theologian, not a lawyer: one of his associates was a physician, and the other a farmer. After the Revolution, the Court of Common Pleas in that State was presided over by Dudley, who was a farmer; Langdon, who was a merchant, and Farrar, who was educated for the pulpit and not the bar. Justices of the Peace are rarely lawyers or licensed attorneys. Sometimes in this State men who were neither lawyers nor licensed attorneys, to the personal knowledge of members of this Court, have filled the office of County Judge, yet no one ever questioned their eligibility.

There is, therefore, no previous custom or usage in this respect which, as suggested by the Supreme Court of Michigan, has by implication become, to all intents and purposes, a part of the Constitution.

The act in relation to attorneys and counsellors (Stat. 1851, p. 48) has no bearing upon this question. It deals with a different subject. It prescribes the qualifications of attorneys and counsellors, as such, and not public officers; or, in other words, the conditions upon which persons so inclined may be allowed to appear and practice law in our Courts in their own right, and not in virtue of official position. It treats of attorneys and counsellors as members of a profession, and not as public functionaries.

Judgment affirmed.

292

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ZENITH GOLD AND SILVER MINING COMPANY v. WILLIAM IRVINE.

[1] SPECIFICATION OF ERRORS IN STATEMENT.—A motion for a new trial should be denied unless the statement specifies the particular errors upon which the moving party will rely in support of his motion. If there is only one question of error that could be raised on the record, this does not excuse the necessity of specifying it.

*APPEAL from the District Court, Eleventh Judicial [303] District, Calaveras county.

The jury found a verdict for the defendant, and the Court thereupon rendered judgment in his favor. Plaintiff filed his statement on motion for a new trial, which statement contained the substance of the testimony introduced on the trial, and also an instruction of the Court. The only exception contained in the statement was to this instruction. Defendant's attorney moved the Court below to strike out the statement, because it did not contain any specification of errors upon which plaintiff would rely. The Court granted the motion, and then denied plaintiff's application for a new trial. The plaintiff appealed.

The other facts are stated in the opinion of the Court.

S. B. Axtell, for Appellant,

Argued that as there was but one error alleged and one exception taken, it was not necessary to specify, in the statement, the particular errors upon which the appellant would rely.

H. P. Barber, for Respondent.

By the Court, SHAFTER, J.:

Appeal by plaintiff from order denying motion for new trial. The motion was denied, on the ground that the statement did not specify the particular errors upon which the plaintiff proposed to rely in support of his motion. The motion was properly overruled, on the ground mentioned.

[1] Cited, Street v. Lemon H. M. Co., 9 Nev. 253.

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If it be true that there is only one question of error that could by possibility be raised upon the record, it does not follow that the plaintiff intended "to rely" upon that. If such was his intention, he could not safely conceal it, nor could he leave it open to argument or inference. But it does not appear even that "errors of law occurring at the trial" was designated generally in the notice of motion as the ground upon which a new trial would be claimed. [304] It appears simply that notice of *motion was "duly given," *non constat*, but the general designation in the notice may have been that the evidence was insufficient to justify the verdict, or that the verdict was against law.

Order affirmed.

FRANCIS M. QUIVEY v. FELIX GAMBERT.[1]

[2] APPEALABLE ORDER.—An appeal does not lie from an order striking out a statement on motion for a new trial.

[3] MOTION FOR NEW TRIAL.—If there are any technical grounds upon which a motion for a new trial may be resisted, such as failure to file and serve notice of motion or to file statement in time, the proper practice is to raise such grounds on the argument of the motion as a reason why the motion should be denied.

[4] IDEM.—A motion for a new trial can be heard only on the record made and settled before the motion is made.

[4] NEW TRIAL.—An order granting or refusing a new trial can be reviewed by the Supreme Court only on the record made and settled before the order is made.

IDEM.—On appeal from an order granting or refusing a new trial a statement cannot be annexed to the order.

STATEMENT ANNEXED TO ORDER.—An order denying or granting a new trial is not one of the orders referred to in section three hundred and thirty-eight of the Practice Act, to which a statement may be annexed on appeal.

AN EXCEPTION.—An exception is an objection taken between the time of calling the action for trial and the rendition of the verdict or decision.

BILL OF EXCEPTIONS.—An order striking out a statement on motion for a new trial cannot be brought before the Supreme Court for review by a bill of exceptions.

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[1] Referred to, Gambert v. Hart, 44 Cal. 550.

[2] Disapproved, Calderwood v. Peyser, 42 Cal. 113.

[3] Cited, Harris v. S. F. S. R. Co., 41 Cal. 404.

[4] Cited, Wetherbee v. Carroll, 33 Cal. 553; Caldwell v. Greely, 5 Nev. 262.

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COURT SHOULD RULE ON MOTION FOR NEW TRIAL.—A party moving for a new trial is entitled to a ruling upon his motion upon the basis upon which it is presented. If his notice or statement has not been filed or served in time, that is good reason why his motion should be denied.

[1] STRIKING OUT STATEMENT OR NOTICE.—The Court should not strike out a notice or statement on motion for a new trial.

[2] AMENDMENTS TO STATEMENT.—A defendant in a motion for a new trial may file amendments to the statement, without waiving his right to object that the notice or statement was not filed or served in time, by a preface that he does so without prejudice to his right to object at the hearing to the notice or statement on these grounds.

APPEAL from the District Court, Third Judicial District, Santa Clara county.

The plaintiff recovered judgment in the Court below, and the defendant moved for a new trial, and filed a statement. *On motion of plaintiff's attorney, the Court [305] struck out the statement.

The other facts are stated in the opinion of the Court.

J. B. Hart, for Appellant.

Wm. Mathews, for Respondent.

By the Court, SANDERSON, J.:

This is an appeal from an order striking out a statement on motion for new trial. The respondent moves to dismiss the appeal upon the ground that no appeal lies from such an order.

We have recently held, in several cases, that an order striking out a statement on motion for new trial is not appealable. (Leffingwell *v.* Griffing, 29 Cal. 193; Ketchum *v.* Crippen, 31 Cal. 365; Pendegast *v.* Knox, ante 73; Genella *v.* Relyea, ante 159.) It is true, we entertained such an appeal in Harper *v.* Minor, 27 Cal. 107, and Jenkins *v.* Frink, 27 Cal. 337, but the point that such an appeal did not lie was not made, and it escaped our notice.

In some districts a practice seems to have arisen in relation

[1] Approved, Calderwood *v.* Peyser, 42 Cal. 117-122.

[2] Disapproved, Morris *v.* De Celis, 41 Cal. 331. Contra, Id. 334. Commented on, Lucas *v.* City of Marysville, 44 Cal. 212. Approved, Poorman *v.* Mills, 43 Cal. 322.

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to proceedings touching new trials, which we think has no foundation in the Practice Act. If the defendant, in the motion, has, or supposes he has, some technical grounds upon which to resist the motion, such as a failure to file and serve notice of motion, or statement, or affidavits to be used at the hearing, within the periods of time respectively provided by the statute, he has been allowed to make a counter motion to dismiss the motion for a new trial where the notice is not within time, or to strike out the statement where the notice is in time but the statement is not. In Harper *v.* Minor, the counter motion was to dismiss the motion for a new trial, and in Jenkins *v.* Frink it was to strike out the statement. We are of the opinion that such a mode of procedure is irregular, and not only without the sanction of any provision of [306] the statute *regulating such matters, but is so inconsistent with the practice contemplated by the statute, and so embarrassing and mischievous in its results, that it ought not to be longer tolerated. Such a practice might be tolerated if such orders were appealable, but even then it would be a bad practice; for if such orders should turn out to be erroneous, two appeals would be necessary instead of one, in order to get the judgment of this Court upon the ultimate question whether there ought to be a new trial or not. But in view of the fact that such orders are not appealable, a moment's reflection will show that the practice is altogether at variance with the methods of the statute, and tends materially to embarrass and complicate the proceedings to obtain a new trial, if not to entirely deprive the party seeking a new trial of his right to the opinion of this Court as to whether he is entitled to it or not.

Suppose the motion for a new trial to be dismissed, or, what amounts to the same thing, the statement or affidavits upon which it is based stricken out, how is the plaintiff in the motion to proceed thereafter? He may claim that his notice or statement, as the case may be, is in time, and if so, he is entitled to the opinion of this Court upon that question. How is he to get his case here within any of the modes fixed by the statute? If no way has been provided, or if there is a way and it is unnecessarily circuitous and compli-

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cated, a practice which necessitates a resort to it ought not to be countenanced.

It is suggested that he may still prosecute his motion for a new trial and insist upon an order denying it, and then appeal from the order. There is a manifest absurdity involved in the idea of further prosecuting a motion which has been dismissed, or the foundation upon which it rests stricken out. But overlook the absurdity and suppose the thing to have been done, what will come to this Court on the appeal—of what will the record consist? In passing upon the question of new trial, we are confined to the record upon which the Court below ruled. By the very conditions supposed, the Court below had no record before it when it denied the motion: so we have *none before us, and, as a [307] matter of course, the order must be affirmed.

But it is suggested that the order dismissing the motion or striking out the statement may be brought up on the appeal from the order denying the motion, by a bill of exceptions. Suppose that this could be done, it would be necessary to come here twice before the motion for a new trial could get here; for the first appeal would merely reverse the order striking out the statement, and a statement would thereafter have to be settled by the Court below, and the motion for a new trial again decided, before we could reach the question. But it cannot be brought here by a bill of exceptions. The definition of an exception, as given in section one hundred and eighty-eight of the Practice Act, is not broad enough to cover such a case. An exception, as there defined, is an objection taken at the trial, or at any time from the calling of the action for trial to the rendering of the verdict or decision.

It is next suggested, that on the appeal from the order denying the new trial, the ruling of the Court in dismissing the motion, or striking out the statement, can be brought up by a statement made on such appeal, as provided in section three hundred and thirty-eight. Suppose that this can be done, such a course would still be objectionable, because it would make it necessary to bring the case here twice before the motion for a new trial could be reached, for the reason, as stated above, that until the error in dismissing the motion

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or striking out the statement has been corrected, no statement for the purposes of the motion for a new trial can be prepared. But we do not consider that orders referred to in the three hundred and thirty-eighth section include orders granting or refusing new trials. Motions for new trials rest here, as in the Court below, upon the record made and settled before the motion is heard. There can, therefore, be no occasion for a further statement on an appeal from such an order, for we can only review it upon the same record upon which the Court below decided. The orders referred to in section three hundred and thirty-eight are evidently such
[308] special *orders as are made during the progress of the case or after final judgment, which are appealable, and are not based upon a record previously made and settled. Where such is the case a statement may be necessary, and hence the section in question has provided that one may be made if required; but where, as here, the record is made in advance of the order, there can be no occasion for a subsequent record.

From these considerations, we think it clear that the practice pursued in this case is out of the line of procedure adopted by the Code. It is manifest that under either mode above suggested, the first appeal, though nominally from the order denying or granting a new trial, is in effect an appeal from the order striking out the statement, for that order is the order and the only one which is in fact reviewed, and the order from which the appeal appears to be taken is not reviewed at all, and cannot be until the case has gone back, and an opportunity has been given to the parties to make a record upon which it can be heard.

To show the utter absurdity of such a practice, it is only necessary to trace it one step further. If a statement can be made up under the three hundred and thirty-eighth section, after a motion for a new trial has been decided, it must be done within twenty days. Suppose a dispute should arise as to whether it was filed within time, and a motion should be made to strike it out also, and should be sustained, how would the case stand then? Would still another statement be in order? If a statement would be in order in the first instance,

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it would for the same reason be in order in the second, and so on to the end of time: statement after statement could be struck out, and all access to this Court on the part of the plaintiff in the motion be cut off. A practice which leads to such absurd consequences cannot be sustained.

A party moving for a new trial is entitled to a ruling upon his motion upon the basis upon which he presents it, in order that he may have and enjoy unembarrassed his right of appeal to this Court. If his notice or statement has not been served or filed within time, that is a good reason why his motion *should be denied when finally brought to [309] a hearing, but under the method of procedure prescribed by the Code, it is not intended that the record upon which the motion is made may be first stricken out and the motion then denied. Such a course is in effect a denial of any hearing upon the motion and of an appeal to this Court in a case where an appeal is given.

There is no force in the suggestion that the defendant in the motion, if not allowed to take this course, will be forced to waive objections as to time. If the notice and statement, or either of them, is not filed within time, he may safely rely upon such facts as fatal to the motion when brought to a hearing. If, however, as is generally the case, there is some doubt as to whether they are within time, and he does not desire to take any risk, he may propose amendments without waiving his right to object that they are not within time by a simple preface that he does so without prejudice to his right to object at the hearing to the notice or statement upon those grounds. By so doing he waives nothing; on the contrary, he preserves all his rights in the premises. The Court will then proceed and settle the statement, and at the hearing pass upon the objections so reserved. If the motion is denied an appeal can then be taken to this Court, where the whole matter can be reviewed upon the record upon which the Court below heard the motion. Such is the plain and obvious course prescribed by the statute, and no departure from it can be indulged, without, as we have seen, mischievous if not absurd results.

The appeal must be dismissed; but we advise the Court

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below to set aside its order striking out the statement and allow the motion for a new trial to proceed in the manner suggested.

SAWYER, J., dissenting:

I concur in that part of the order which dismisses the appeal, on the ground that the order from which the appeal is taken is not appealable, but I am compelled to dissent [310] from *the advice given to the District Court, and from those portions of the prevailing opinion upon which it is based. In my judgment, a motion to strike from the files a statement on motion for new trial, which has been irregularly, or improperly filed, is regular and proper. A party has no right to put upon the files of the Court a statement, without having given in due time a proper notice of his intention to move for a new trial, or after the time allowed by law for filing a statement has expired, or a document which he chooses to call a statement, but which in no respect fulfils the requirements of the statute as to what shall be necessary to constitute a statement; and when he does assume to file a statement after his right has expired, or a paper of the character indicated, he places a document upon the files, which he has no right to place there, and which has no proper place in the records of the Court. He has, however, in fact, without authority of law, put it on the files, and the question is, what is to be done with it? I had always supposed the best way to dispose of a paper, which had been improperly filed, or for any reason had illegally got upon the record, was to get it out of the way—get rid of it as soon as possible—and that in all such cases the proper practice was to move, at the first opportunity, to strike it from the files. It is an illegal encumbrance upon the record, and has no business there. Why not make short work of it by removing the excrescence? Such, so far as my observation goes, has been the practice with reference to all documents which parties have filed without right, or which have improperly found their way upon the records of Courts. And I see no reason why the practice which has heretofore obtained with reference to statements, as well as to other documents filed without authority, is not

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entirely regular and proper. It is the shortest, easiest, and most convenient way of disposing of them.

Under the New York Code, a motion for new trial may be made upon a "case" answering in many respects to our statement. (N. Y. Code, sec. 265.) The statute does not minutely point out the mode of proceeding in making up a *case. The details are left for the Courts to prescribe [311] by rule, and rules thirty-four and thirty-five cover the grounds provided for by statute in this State. (Voorhies' Code, ed. 1864, pp. 864–5.) Rule thirty-five contains provisions similar to our statute with reference to waiving the right to a statement. It is as follows: "If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the Justice or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed." Upon the subject of improperly filing a "case," after the right is waived, Whittaker, in his work on Practice under the Code, says: "If, on the contrary, the moving party, after loss of his right to have the case and amendments settled, should file, or attempt to proceed upon the former in its original form, a special motion to take it off the files will be proper." He does not cite any authority, but, doubtless, grounds his statement of the remedy upon the good sense of the thing, and the unquestioned practice in that State.

It is said, however, that the Practice Act does not provide for striking out statements, and the practice is out of the line of the methods indicated. The reason of the absence of any express provision to that effect seems obvious enough to my mind. The law does not contemplate any irregular proceedings. It provides for a regular course of judicial proceedings, and contemplates that the course indicated will be pursued. It does not presume that a statement on motion for a new trial will be filed without a previous notice of intention to move duly served, or after the time allowed by law has ex-

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pired, and the right has been waived, or that it will be filed in any instance without authority of law, and therefore does not make any express provision for dealing with such a case.

Nor is any required. The power to purge its files and [312] records *of all matters which have been illegally placed upon them, is necessarily inherent in the very constitution of all Courts.

If this is not good practice, there is, of course, but one alternative left—the one suggested in the opinion of my associates—to treat the statement as though it was regularly and properly filed, notwithstanding the fact that it is illegally on the record, placed there without the shadow of right, and to be ultimately entirely disregarded; go through the labor—and sometimes very arduous and annoying labor—of preparing and serving amendments, serving notice of settlement, requiring the Judge to devote a few hours, or days, as the case may be, to its settlement; also as much time as may be necessary to the argument and determination of the case upon the matter in the statement, as well as the regularity of the proceeding, and then bring it to this Court, and upon preliminary motion have the entire statement, as finally settled after so much labor, struck out because the original statement served was filed without a notice of intention to move for new trial, or after the time had expired, or because the document in the record is no statement. I do not suppose a term of this Court has passed since its organization, without striking out one or more statements on motion for new trial on these very grounds—because they were improperly filed, and had no proper place in the records of the Court from the beginning. (De Castro *v.* Richardson, 25 Cal. 49.) "It is manifest the statement was not prepared and filed within the time prescribed by the statute, and consequently it forms no part of the record." (Ryan *v.* Dougherty, 30 Cal. 221.) A statement without legal notice of motion for new trial cannot be "annexed to the record of the judgment or order from which the party may appeal." (Flateau *v.* Lubeck, 24 Cal. 366.) If it forms no part of the record, why compel the Court below to treat it as a part of the record, and put the parties to the expense of bringing it here? Why not meet the intruder at

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the threshold, by striking out the document as soon as it appears, without imposing on the counsel and the District Judge this accumulated burden of useless labor, and saddling *the cost upon the litigants? Has this Court [313] any greater power in the premises—any greater power to strike out—than the District Court? If so, where is it to be found? I confess I am unable to perceive any good reason for holding the practice of striking out statements illegally filed, which has heretofore very generally prevailed, to be irregular. On the contrary, it appears to me to be an entirely regular, convenient, speedy, and proper mode of disposing of them. It enables the party aggrieved to raise the objection at once, and, if found to be well taken, both parties and the Court avoid, in many instances, a vast amount of unnecessary labor, and a large amount of costs are saved to the litigants. A second appeal may possibly sometimes, but very rarely, be required under this practice.

The striking out of a statement which has been improperly filed in no way interferes with the regular proceedings on a motion for a new trial. It is a proceeding interlocutory to the order granting a new trial. The striking out of the statement takes away those grounds necessary to be presented by statement, but not necessarily all the grounds upon which the application or motion for new trial may be subsequently made. Only three causes, out of the seven, for which a new trial may be granted, depend upon or have any relation to a statement. (Pr. Act, sec. 194.) The motion is often, perhaps usually, made on some of the other four grounds, as well as those required to be presented by statement. In such case, the striking out of the statement takes away a portion of the basis upon which the moving party intends to rely. He may still obtain a new trial on the other grounds. His statement is not his motion or application. It simply contains the grounds, in whole or in part, upon which the moving party relied to sustain his motion. In Jenkins *v.* Frink, 27 Cal. 339, we said that the third step in a proceeding to obtain a new trial is: "The motion, or, in the language of the statute, 'the application for new trial,' which 'shall be made at the earliest period practicable after filing the affidavits or statements.'

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[314] *(Sec. 196.) 'An application for an order is a motion.' (Sec. 515.) The motion, then, is a distinct and separate step in the proceedings, and subsequent to the notice of intention to move, and to the filing of the statement." Striking out the statement is not a disposition of an application or motion for new trial, and does not prevent a prosecution and final disposition of the motion by an order granting or denying it. It may be granted on other grounds. If, however, the moving party has no other grounds than those presented by the statement, his motion, if he still makes one, will undoubtedly be denied; but there is no final and appealable order till a ruling denying or granting a new trial is made; and there is nothing in the way of prosecuting the motion till the order is obtained. It may as well be done when there are no grounds other than those required to be presented by a statement, as when there are other grounds.

But it is said that an appeal from the order denying a new trial after striking out the statement, is, in effect, an appeal from the order striking out, as that is the only order reviewed. The same may be said with equal propriety of the case of an order sustaining a demurrer to a complaint, but which goes no further. The order is only interlocutory, and not appealable. The party desiring to appeal must prosecute the matter to a judgment against himself, or he cannot appeal. (Moulton *v.* Ellmaker, 30 Cal. 527; Moraga *v.* Emeric, 4 Cal. 308.) And when the appeal from the final judgment is taken, the interlocutory order sustaining the demurrer only is reviewed in the same sense as the order to strike out a statement is reviewed on appeal from the order denying a new trial. The two cases are parallel, and I am not able to perceive that there is any greater absurdity in the necessity for prosecuting the proceeding to the final order in the former case than in the latter; and I am not aware that any objection has ever been urged to entering final judgment after overruling the demurrer, and then appealing from the final judgment because the interlocutory order was really the one to be reviewed.

I also think my brethren in error in supposing that, [315] if a *statement is erroneously striken from the files, the moving party is without remedy. To my mind, the

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remedy is plain. The statement on motion for new trial only brings into the record those matters which transpired during the trial and which affect the verdict. When the motion is heard on a statement duly prepared and filed, the statement is the only one necessary on an appeal from the order granting or denying a new trial. But there may be matters affecting the order which have no place in the statement on motion for new trial, or anywhere else in the record, except in a statement on appeal from the order. And whenever such a case arises, the party appealing is entitled to make a statement on appeal under section three hundred thirty-eight: "When the party who has the right to appeal, wishes a statement of the case to be annexd to the record of the judgment *or order*, he shall, within twenty days after the entry of such judgment or order, prepare such statement," etc. Then follow provisions for settling the statement, and section three hundred forty-two provides that "A copy of the statement shall be annexed * * if the appeal be from an order, to a copy of such order." These provisions mention orders generally, and include all orders appealable under section three hundred forty-seven—orders granting or denying new trials, as well as others—if "the party who has the right to appeal wishes a statement of the case to be annexed to the record of the * * * order." There is no exception made. Under this provision, the party could make a statement after the order granting or refusing a new trial is made, in which he could state the matters which have not as yet in any form been made record—as the making and filing of a statement, the motion to strike out, the grounds of the motion, the order thereon and his exception to the ruling, and the subsequent denial of the motion for a new trial. If the motion to strike out is on the ground that no notice of new trial has been given, or that the statement has not been filed in time, it is not even necessary to insert the statement filed. (Harper *v.* Minor, 27 Cal. 115.) The question would be not on the sufficiency of the statement, but on *the right to file, and it would only be necessary to state so much as would be necessary to present that question. Even where the question is as to the sufficiency of the statement, it is generally on the ground that there [316]

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is no specification of the grounds upon which the party intends to rely on his motion, or that the grounds are insufficiently specified. In such cases, the statement on appeal from the order granting or denying a new trial need only state that there was no specification of grounds, or set out the grounds when claimed to be insufficient. This Court could then see if there is a sufficient specification of the grounds relied on to form the basis of a statement as the term is construed in Hutton *v.* Reed, 25 Cal. 485, and justify the introduction of the testimony or other matters necessary to explain or point them. If there is no specification at all, of course that ends the matter. By pursuing this practice, the record on appeal would generally consist of but very few pages, while by pursuing the other course suggested in the prevailing opinion, it would be necessary to bring up the entire statement on new trial, which sometimes consists of some five hundred to two thousand printed folios. Harper *v.* Minor affords a good illustration. (See 27 Cal. 115.) Can there be any question as to what mode of proceeding is the cleanest, most speedy, convenient, and least laborious, vexatious, and expensive?

But if I am wrong in supposing that the aggrieved party is entitled to make a statement on appeal from the order, and the consequences suggested in the opinion of the Court must follow the practice of striking out, that is to say, that there will be no remedy, then, in many instances, the same objections apply with equal force to the practice recommended by my associates, and the same consequences must follow. Suppose a contest arises whether a notice of intention to move for a new trial has been served at all, or, if served, whether served in time, or whether a statement has been filed in time. These questions often arise from various causes, such as defective attempts to make service personal, or substituted; mistakes and disputes about dates; mistakes in orders ex-
[317] tending *time, or failures to procure orders supposed to have been obtained; questions as to genuineness of signatures to admissions of service, etc. We have had numerous illustrations in cases before this Court. The notice or statement filed may appear upon its face upon the evidence

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indorsed to be in time and regular. In such cases, the party objecting on the ground of failure or irregularity must almost always present his objection by affidavit, or other evidence not of record, and the other party meets the case by similar evidence. How are these matters to get into the record to be presented to this Court? They are no part of the statement or motion for new trial. Section one hundred ninety-five prescribes the contents of that document, and it embraces nothing that did not occur during the progress of the trial and previous to the verdict. They are no part of the affidavits provided for in section one hundred ninety-four, to present the grounds of new trial designated in the first four clauses of section one hundred ninety-three, and no part of the documents designated in section one hundred ninety-five to be used on the appeal. An exception within the meaning of that term, as defined by sections one hundred eighty-eight and one hundred eighty-nine, can no more be taken and preserved upon them than on a ruling of the Court on a motion to strike out a document irregularly filed. If these sections are to be construed strictly, as my associates seem to hold—and in this construction I am inclined to concur—they only refer to matters which occur during the progress of the trial; that is, from the beginning to the end of the trial—from the calling of the case for trial to the rendition of the verdict. These only, upon the construction given, would seem to be the exceptions which are to be annexed to the judgment roll, under section two hundred three. But they do not embrace the matters under consideration. There is no mode provided for getting such matters into the record, except by a statement on appeal from the order, such as I have indicated, and if that mode is inadmissible, then the party is without remedy in all cases, where the objection to the statement is presented by affidavit, or *documents and evidence of any kind not [318] in itself record, and, as before said, the objection lies, in these instances, with as great force against the practice recommended by my associates, as against that which has heretofore prevailed, but which is now, for the first time, condemned.

It is further said, that motions for new trials rest on a

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record made and settled before motion had; that we can only review the action of the Court below on the same record; and that there is, consequently, no occasion for a statement on appeal from orders granting or refusing new trials. This is doubtless true, when all the errors or rulings sought to be reviewed on appeal occurred before the verdict or finding, and are presented in the settled statement on motion for new trial—that is to say, when the rulings complained of are in the record upon which the Court below acted. But sometimes they are not in the record. The statement on motion for new trial is to contain only the grounds upon which the party intends to rely particularly specified, and "so much of the evidence, or a reference thereto, as may be necessary to explain the particular points thus specified, and no more." (Sec. 195.) When the parties cannot agree, the statement must be settled by the Judge. In settling the statement he acts judicially. The moving party may have introduced matter to which the other party objects as irrelevant to the points specified, and he, in turn, offers amendments to which his opponent objects on the same grounds. The Judge must rule upon the matters, either admitting or rejecting, as he shall adjudge the right to be. It is his duty to exclude irrelevant matter. (McMinn v. Whelan, 27 Cal. 321.) He may err in these rulings, as well as in others, and the statement, as finally settled, may bear but a faint resemblance to that originally proposed. But it is the statement as settled and certified—the result of the judicial contest, and the rulings of the Court in the process of settlement, and not the statement, as first proposed, or the means by which the result is attained, that constitutes the record upon which the Court finally acts, in granting or denying a new trial. It is this result [319] alone—*this settled statement—that is recognized as the record by section one hundred ninety-five. The contest upon affidavits or other evidence over questions of time, due service of notices, or filing of statements and the ruling of the Judge upon them; the litigated points in the efforts of the parties to introduce or exclude evidence as material or irrelevant to the points specified, and the rulings of the Judge upon these points, have no place in the settled

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statement, or anywhere else in this record made. The statement, like the finding of the Judge upon the trial of the issues of fact in the case, is the result of litigation—the former in settling, the latter in the trial—but the rulings in the progress of the proceedings are no more made to appear in one case than in the other. The record discloses the result in both cases—a settled statement in one, and a finding in the other—but it does not in either case disclose the rulings, or the matters upon which the rulings are based, which produced the result. This Court on appeal can only see the settled statement. It cannot view the proposed statement as originally filed; or the amendments offered by the other party; or the prefatory matter introduced, as suggested in the prevailing opinion, to guard against the waiver of any right; or know by what means, or upon what erroneous rulings, all these—to use the expression of an eminent English Judge—were "licked into shape" of a settled statement. They are no part of the record upon which the Court acted, when it came to consider the motion for new trial. Those rulings, if erroneous, have worked their mischief, and quietly dropped out of sight. The settled statement may be regular upon its face, and clearly support the order granting or denying a new trial based upon it. If so, this Court must necessarily affirm the order, when that record alone is brought up. Yet there may have been one or more of the rulings indicated which wholly vitiated the statement as settled—the record upon which the motion was decided—and produced a judgment just the reverse of what it should have been. We have, then, in the case supposed, one or more errors, upon which an appealable order finally determining *the [320] rights of the parties to the action alone rests, and, as yet, no record by means of which the errors can be presented to this Court for review. Is there no way of reaching them? As we have seen, section one hundred ninety-five prescribes no mode by which these erroneous rulings can be brought into the record. It only provides for those matters which arose in a prior stage of the contest before the verdict. I do not understand my associates to be of a different opinion on this point. They expressly hold that the Practice Act does

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not authorize a bill of exceptions to be made and annexed to the record of the order for the purpose of bringing into the record matters not disclosed by the settled statement; and that a statement on appeal from the order is equally inadmissible. No other mode of making these matters record is pointed out by them, and my examination of the Practice Act discloses none. Upon the theory adopted, then, it must result, it would seem, that there are, or may be, errors in the course of judicial proceedings resulting in a final erroneous determination of the action, which ought to be reviewed, but for the review of which the Practice Act has failed to provide. Yet it has provided an appeal to enable this Court to review that part of the record made which discloses no error in the case supposed, but which was itself the result of those very errors which have been withdrawn from scrutiny, or rather, which the methods of procedure adopted have failed to present for examination. Upon the theory that the appellant is not entitled to make a statement on appeal, under section three hundred thirty-eight, to present these rulings, we have errors vitiating the order from which the appeal is taken, without a record to disclose them—the very kind of a case for which a statement on appeal from all other orders was provided. There may, then, sometimes be, in actual practice, occasion for a statement on appeal from orders made upon a statement before prepared, in the preparation of which error intervened, which errors the record already prepared does not disclose.

Again: the practice of striking out statements on [321] motions *for new trials is now condemned as unauthorized. It would, therefore, henceforth be regarded as error. The practice prevails, however—so much at least must be conceded—and our decision may be overlooked, and statements may still be struck out. Suppose such an instance occurs. The party aggrieved will be entitled to have the error corrected on appeal. He cannot appeal from the order striking out. That point is settled. It would be absurd, say my associates, to prosecute the motion and obtain a ruling on it, when there is nothing left for it to rest upon, and then appeal from the order denying a new trial. Besides, if he should,

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under the decision in the present case, we must necessarily affirm the order. The motion was not based upon anything, and there is no record presenting the previous ruling striking out the statement filed. A bill of exceptions is held to be unauthorized; a statement on appeal equally inadmissible, and there is no other mode appointed for presenting the ruling for review. The only remedy that occurs to me is that adopted in this case—*advice;* and the advice may well be regarded as extra-judicial, for we have dismissed the appeal for want of jurisdiction, and the subject-matter of the advice is in no way before us. We have in several instances before declined to express an opinion on matters not embraced in any record before us, even when urged to do so by counsel. This Court, it would seem, is powerless to correct the irregular practice, for the reason that there is no mode of presenting the question for review in such a manner as to enable it to render an authoritative decision, and enforce it by a mandatory judgment. If it is error to strike out a statement on motion for a new trial under every conceivable state of facts, the party aggrieved ought certainly to have some means of presenting the erroneous order to this Court for correction by an authoritative judgment; and if there is none, the Practice Act is inadequate to accomplish the objects for which it was designed.

I confess, it seems bordering on presumption to still persist in maintaining my views, after they have been so confidently *pronounced absurd by my brethren. Yet, [322] after a careful consideration of the prevailing opinion, with due submission, I still think the plain, unembarrassed remedy in all these cases is, by statement on appeal from the order granting or denying a new trial. The Practice Act I believe to be fully adequate to accomplish all the purposes for which it was designed.

There are many rulings in the progress of a cause previous to a trial, and perhaps in other stages of the proceedings, which are liable to be erroneous and which a party is entitled to have reviewed, but which he cannot make the subject of an exception, as the term is used in sections one hundred eighty-eight and one hundred eighty-nine of the Practice Act. The same is also true in respect to the various appealable orders;

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and, in my view, the office of the statement on appeal, either from the judgment or order, is to enable the party aggrieved to bring into the record in this mode those matters which are not made record in any other designated mode. The statement on appeal from all appealable judgments, and orders, is the medium provided by law for presenting for review in this Court every ruling of the Court below affecting the judgment or order from which the appeal is taken, from the first inception of the suit, or proceeding, to the final judgment or order, where the question does not arise on the judgment roll, or is not presented in some other mode specifically prescribed by statute. It is the peculiar office of the statement on appeal to present those matters for which no other specific provision is made. *It was designed to cover other grounds and reach other errors, than those presented by a statement on motion for a new trial.* Some of the rulings on questions of law embraced in a statement on motion for new trial may, it is true, also be presented by bills of exceptions and statements on appeal from the judgment; *but the general purpose of statements on appeal, both from judgments and orders, is to provide for errors in other portions of the field of litigation than those covered by statements on motions for new trial.* We substantially so held, as I think, in Harper *v.* Minor, 27 Cal. 109. This mode, I also think, includes those objections taken to [323] *statements on motions for new trial, depending upon matters shown by affidavits, and other evidence *dehors* the record made, and those rulings made in the process of settling the statement, and of which there is no other mode provided for making a record. And this, it seems to me, is a plain and simple mode of making up the record of matters which parties desire to have reviewed, in which each party has an opportunity of introducing everything which will tend to illustrate his views of the case. (Abbott *v.* Douglas, 28 Cal. 299–301.)

As we have seen, no mode of bringing many matters of the kind before indicated in this opinion into the record is suggested in the prevailing opinion, and, as it is fair to presume one would have been suggested had any occurred to the minds of my associates, I think it may be safely concluded,

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that there is no remedy in those cases, unless the view maintained in this opinion is sound. Now, the general methods of the Practice Act for making records of matters not otherwise provided for, is by statement on appeal from the judgment, or order, which is the subject of appeal. Section three hundred thirty-eight so expressly provides, and this is not attempted to be controverted. The provisions of this section apply to every appealable judgment and order, unless an appeal from an order granting or denying a new trial be an exception. This I do not understand to be disputed. A statement on appeal from such order, for the purpose of bringing into the record those intermediate rulings and matters affecting the order not otherwise presented, is, therefore, in entire congruity and harmony with the methods prescribed by the Practice Act with reference to every other appealable order. Whether the method be good or bad, it is the one prescribed, and I may be permitted to say, I think it both simple and good. If it is good as to other orders, it must be good for accomplishing the same purpose on appeals from orders granting and denying new trials. No substantial ground for a distinction is apparent to my apprehension. Nor, if I read section three hundred thirty-eight aright, is any distinction made by statute. The language *is: "record of the judgment or order," with- [324] out saying any particular order, and is as applicable to the orders under consideration as to any other appealable order. No exception is made in this section, or any other brought to my notice. If it does not apply to orders granting and denying new trials, then those orders are exceptions to the general methods prescribed by the Practice Act—out of harmony with the general system—and it seems reasonable that it should devolve upon those who allege the exception and incongruity, to show the exception by some express provision, or some plain, unquestionable, necessary implication from express provisions. I do not wish to speak too confidently. I may—perhaps I ought to say must—be mistaken; but this, it does seem to me, my associates have utterly failed to do.

It is suggested that the utter absurdity of the view maintained in this opinion will be apparent by tracing the pro-

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ceeding one step further—that the same difficulty might occur in making a statement on appeal that arose in making the statement on motion for new trial, and statement might follow statement *ad infinitum*. It is, perhaps, a sufficient answer to this suggestion to observe, that the statute provides for nothing beyond a statement on appeal from the order upon motion for new trial. The statement can only reach those matters prior to and affecting the order. The order granting or denying a new trial is the last appealable order in that line of proceeding. There must be an end of statements, as of all things finite, and this is the end of the law in that line of procedure. It may be said that there may, then, at last, be an error without a remedy. Be it so. *Ita lex scripta*. But the view maintained in this opinion has, at least, this advantage over that of my associates—an opportunity is afforded by it to review and correct all errors of every kind which intervened in the prior stages of the proceedings in any way affecting the order from which the appeal is taken; and this opportunity can only be lost by some further blunder subsequent to the order. I apprehend that, in practice, the liability to go on repeating in the statement on appeal from
[325] the order *denying a new trial the errors which had before occurred, is more imaginary than real. The necessity for a statement on appeal from these orders usually arises from some slip, mistake, loose practice, or want of precaution in the proceeding to make a statement on motion for new trial; and the party cast is not likely to repeat it in the subsequent stages of the same proceeding, after having once suffered the inconvenience resulting from his action. The statement on appeal, also, would ordinarily cover only a few points—a very narrow field—and chances for error would, consequently, be exceedingly limited. A reasonable opportunity to correct the errors affecting the order has at least been afforded, and the liability to go on repeating errors is so small, that the law-making power has not seen fit to pursue the subject of remedy further. Is it not possible that the suggestion I am now considering pushes the possibilities of error without remedy to an *absurd extent* in pursuit of an *absurd consequence*, to aid an argument otherwise unsatisfactory?

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An order striking out a statement on appeal from a final judgment would be appealable, because such an order "is a special order made after final judgment," within the meaning of section three hundred forty-seven. It is a special order, and it follows the judgment in the same line of proceeding. Upon such appeal the party appealing would, undoubtedly, be entitled to have a statement on appeal annexed to the order under section three hundred thirty-eight; and in this way he could make a record of the rulings upon which the order striking out ultimately depended. And I see no reason why a party is not entitled to appeal from all special orders after final judgment, and annex a statement showing an error complained of, so long as the Court continues to make them. So the statute provides.

In Harper *v.* Minor, 27 Cal. 109, there was also an appeal from an order striking out a statement on appeal from the final judgment, as well as from an order dismissing motion for new trial. This Court affirmed the order striking out the statement, and in so doing necessarily recognized the practice *of striking out as being regular and proper. [326] We said, "There is no error in striking out the statement, and the order must be affirmed." (Id. 115; see also Levy *v.* Gettleson, 27 Cal. 686.) If it is regular to strike out a statement on appeal which has been improperly filed out of time, it must, of course, be proper to strike out a statement on motion for new trial upon similar grounds. It is true no question was made by counsel in that case as to the regularity of the practice of striking out statements. Neither has any such question been raised by counsel in this case, nor, so far as I am aware, have counsel on any occasion, in this Court, or elsewhere, questioned the regularity of the prevailing practice. Nor has this Court before done so. (Vilhac *v.* Biven, 28 Cal. 412; Loucks *v.* Edmondson, 18 Cal. 203; De Barry *v.* Lambert, 10 Cal. 503; Ketchum *v.* Crippin, 31 Cal. 365; Pendegast *v.* Knox, ante 73.) I trust it may, without disrespect, be added that it seems to me to be very late to discover, for the first time, that the practice in question is irregular and mischievous. I am still of opinion that the practice

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is regular; but if not, I think it ought to be made so by further statutory provisions.

While I think a motion to strike out a statement improperly filed correct practice, and in very many cases the simplest, most convenient, cheapest, and best mode, I am free to admit that there are, perhaps, instances where prudent counsel might think it best or safest for them to pursue the mode indicated in the prevailing opinion. Counsel might not feel quite sure of their ground, and think it desirable to have the questions arising on the merits determined in the same appeal in case the decision upon the objections to the statement should finally be against them, or they might be unwilling to risk the loss of some right by failing to present amendments, and for that reason take their objections and still go on with the settlement of the statement in the usual way. If counsel are disposed to pursue that course, I know of no valid objection to their doing so. I think counsel would be entitled to pursue either course, as the exigencies of the particular case might seem to them to require.

[327] *In the case of Harper *v.* Minor, one appeal was from the order dismissing plaintiff's motion for new trial. No point was made as to its being an appealable order, and our attention was not called to the question. It is not so clear that such order is not appealable. We have never decided that it is not, and I am inclined to think it is. An order dismissing a motion for new trial would be a final disposition of the motion, and possibly a substantial denial of the motion rendering it appealable. It is certainly very different, in its effect, from an order striking out a statement, for in the latter case there might still be other grounds presented by affidavits filed in time. The striking out of a statement improperly filed, or the striking out of affidavits alone, filed too late, would not necessarily in all cases result in a denial of the motion. At all events, it is not a denial or final disposition of the motion; and if the party aggrieved desires to appeal, he should still make his motion and obtain a ruling upon it. Section one hundred ninety-six requires that "the application for a new trial shall be made at the earliest prac-

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ticable period after filing the affidavit or statement." Suppose a party should fail to prosecute his motion with diligence, and the Court should dismiss it for want of prosecution, would this be an appealable order? It would be a final disposition of the motion; but no more so than in case of dismissal on the ground that a party had failed to be sufficiently diligent in filing a statement or affidavits—for failing to file them in time. The District Court dismissed a motion for a new trial in Eckstein *v.* Calderwood, 27 Cal. 413, for failure to prosecute it with due diligence, and this Court entertained the appeal and affirmed the order of dismissal, but no point was made as to the order being appealable. It was, as before remarked, at least a final disposition of the order. Judgments dismissing actions for want of prosecution are often entered, and appeals have been entertained from such judgments; and it must be on the ground that the judgment is, in effect, a final disposition of the case. But I have not alluded to this question with a view to express any opinion upon the question, *but merely to suggest that the effect of an [328] order dismissing a motion for new trial is substantially different from an order striking out a statement.

J. J. BLATNER *v.* ERWIN DAVIS.

ASSESSMENT OF LOT FOR STREET IMPROVEMENT.—If a lot in San Francisco is assessed for a street improvement to a person by name, and not to unknown owners, the contractor cannot recover judgment against another person for the assessment.

IDEM.—An assessment on a lot in San Francisco for a street improvement, made to a person by name, is an assessment to him as owner. Such assessment, to be valid, must be made to the owner, if known.

APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

The facts are stated in the opinion of the Court

Ralph C. Harrison, for Appellant.

No personal liability against Davis was created by any of

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the proceedings had in the premises. He is not named in the assessment as the owner of the lot assessed. The statute (Stat. 1862, p. 397, sec. 9) requires the assessment to be made to the "owner of each lot, if known to the Superintendent," and it is only the owner so assessed that can be made liable for the amount assessed. (Smith *v.* Davis, 30 Cal. 536.) As a corollary from the argument in that case, no person can be made to pay an assessment, even if he is the owner, unless he has been named as the owner in the assessment. When the statute directs the Superintendent to assess the lot to the "owner," it has a meaning which he is not at liberty to disregard. Unless the assessment is made in conformity with the requirements of the statute, it is utterly void. (People *v.* Sneath, 28 Cal. 615; Moss *v.* Shear, 25 Id. 46; Kelsey *v.* Abbott, 13 Id. 619.) In each of these cases, it was held a vital defect in the proceedings that the assessment was not made to the owner of the lot charged. That it is only [329] the *person who is assessed against whom the right of action exists, is apparent from an examination of the several sections of the statute.

O. L. Lane, for Respondent.

The only facts apparent by the record are what appear by the complaint. And the complaint alleges that at the date of the assessment the said defendant Schaffer, and the defendant Erwin Davis, owned the land jointly. That the land was duly assessed, but that said defendant Schaffer alone was named as the owner. And we submit that the assessment was not void for any such reason, and if not void, the defendant Erwin Davis was both a proper and necessary party defendant; and as there is no statement of the evidence, all the allegations of the complaint are presumed to be proved.

By the Court, CURREY, C. J.:

This action was brought to recover the amount of an assessment against a certain lot in the city of San Francisco for work done in the performance of a street contract. Issue being joined between the parties named, the cause was tried by the Court and a judgment rendered against the defendant,

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from which he appealed directly to this Court, relying upon the judgment roll alone as disclosing errors of law demanding a reversal of the judgment.

Upon the facts stated in the complaint, which the Court found to be true in substance, the appellant maintained that he, instead of the plaintiff, was and is entitled to judgment. The action, in form, is against the appellant and one J. P. Schaffer, and it is charged in the complaint that after the work, for which the plaintiff claims to be entitled to compensation according to the terms of his contract with the Superintendent of Streets, was done, the Superintendent approved of the same, and thereupon made a diagram exhibiting the premises upon and adjoining which the work had been done, and each *lot liable to be assessed and charged therefor, [330] and also prepared an assessment list, showing the amount and rate to be paid upon the contract, specifying the amount of each assessment, with the name of the owner or owners of the particular property assessed, "so far as known;" which diagram and assessment was duly recorded in the office of the Superintendent of Streets. The plaintiff then states that from the inception of the proceedings instituted and had, until the commencement of the action, the defendants had been and still were the owners of the lot described in the complaint; and then it is further alleged "that said lot of land is, by said assessment aforesaid, assessed to said J. P. Schaffer." The finding of the Court upon this point is, that the lot described was "assessed to said J. P. Schaffer in the said assessment."

The tenth section of the act of 1862 (Stat. 1862, p. 397) provides that to the assessment shall be attached a warrant which shall be signed by the Superintendent and countersigned by the Auditor of the city and county, authorizing and empowering the contractor, his agent or assigns, to demand and receive the "several assessments upon the assessment and diagram;" which warrant, assessment, and diagram shall be recorded; and then it is declared that "when so recorded, the several amounts assessed shall be a lien upon the lands, lots, or portion of lots assessed respectively, for the period of two years from the date of said recording, unless sooner dis-

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charged." The thirteenth section of the act authorizes the contractor or his assigns, after a certain period, to sue in his own name "the owner of the land, lots, or portions of lots assessed, on the day of the recording of the warrant, assessment, and diagram, or on any day thereafter during the continuance of the lien of said assessment, and to recover the amount of any assessment remaining due and unpaid;" and the same section provides that "the Court in which suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of sale of real estate by process of said Courts." By reference to the statute, [331] it will *be seen that the assessment list must exhibit the number of each lot or portion of a lot assessed, and the rate at which the same is assessed per front foot; the amount of each assessment; the name of the owner of each lot or portion of a lot, if known to the Superintendent, and if unknown, the word "unknown" must be written opposite the number of the lot, and the amount assessed thereon. Thus it is provided that the assessment must be made to the owner, when known to the Superintendent, and if he be unknown, then a particular mode of assessment is prescribed. In this case, the assessment was made to Schaffer as if he was the sole owner of the lot. Schaffer was made a defendant in the complaint, and charged as an owner with the appellant of the property described; but there is no evidence in the record that he was served with process or appeared in the action. Judgment was rendered against the appellant alone, for the amount of the assessment imposed, against the lot assessed, as the property of Schaffer, and the Court decreed the same to be a lien thereon. If the property was properly assessed as belonging to Schaffer, there is no apparent reason for charging the appellant with the amount assessed. If the property belonged to the appellant and Schaffer as tenants in common, it should have been assessed to them jointly as owners. As the matter stands, the appellant is charged with an assessment made upon the lot in question as the property of Schaffer, and a judgment is had against him as upon a contract, to which, according to the condition of the act under which

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the proceedings were instituted and undertaken to be conducted to a consummation, he never became, by force of the act, a party.

In Smith *v.* Davis, 30 Cal. 536, this Court said: "The defendant can be made to pay only upon its being shown that the steps of the statute have been strictly followed. If his name was known to the Superintendent, it should have appeared in the assessment. If it was not known, the Superintendent could have so stated, and the assessment would have been good." In that case, the assessment was to a person as the owner of the property who had been dead several years. *It was sufficient that the party sought to be [332] charged had not been assessed as the owner in any mode provided by the statute. In the case under consideration, the name of the appellant does not appear in the assessment as the owner or one of the owners of the lot assessed, nor does it appear that he was unknown to the Superintendent of Streets, and that his interest in the property was duly assessed as required in such cases. The complaint, as already observed, states that the lot in question was assessed to Schaffer, which means that it was assessed to him as the owner. This statement, which is found to be true by the Court, shows that the assessment did not affect the appellant, and consequently that the proceedings had and upon which the plaintiff relies for compensation under his contract with the Superintendent, were of no binding force upon the appellant, and created no legal obligation on his part to pay the sum for which judgment passed against him. (Smith *v.* Davis, 30 Cal. 536; People *v.* Sneath, 28 Id. 615; Moss *v.* Shear, 25 Id. 46; Kelsey *v.* Abbott, 13 Id. 619; Taylor *v.* Donner, 31 Cal. 480.)

Judgment reversed, and cause remanded.

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JOSEPH KILE AND REESE B. THOMPSON v. SILAS TUBBS.[1]

[2] EJECTMENT. — To entitle a plaintiff in ejectment to recover possession of the demanded premises, he must not only have a right of entry at the time of trial, but must have had it also when the suit was brought. If he did not have a right of entry when the suit was commenced, but has acquired it *pendente lite*, he cannot recover.

NEW TRIAL.—If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted on the ground that the evidence is insufficient to justify the verdict.

LAW OF CASE.—A question made and passed on by the appellate Court in a particular case becomes the law of that case in all its stages.

APPEAL from the District Court, Fifth Judicial District, San Joaquin county.

The plaintiffs' patent was issued in June, 1862, by [333] the *State, after a full compliance by them with the acts of the Legislature regulating the sale of swamp and overflowed lands. The action was commenced in August, 1862. The defendant went on the land in January, 1862, and claimed the right of possession as a preëmptor under the laws of the United States, as being public land of the United States, subject to settlement and to entry for the purposes of preëmption. The land had not been surveyed by the General Government at the date of the defendant's entry, and was not surveyed until 1864, in which year the township embracing the premises was surveyed, and a plat thereof, approved by the United States Surveyor-General for California, was duly filed in the local Land Office, at Stockton. This approved plat remained on file in the local Land Office for *about one year*, when it was withdrawn by order of the Surveyor-General, and had not been returned at the time of the trial below, which took place in April, 1866. The plat, so approved and filed, determined and indicated the quarter section in controversy to be swamp and overflowed land. Within sixty days after the plat was filed in the Register's office the defendant applied to that

[1] See S. C., 23 Cal. 491; 28 Cal. 402 and notes.

[2] Cited, Fischer v. City of Benicia, 36 Cal. 562. Approved, Meeks v. Kirby, 47 Cal. 170.

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officer to make a declaration of intention to preëmpt, but was refused for the reason that the Government survey and the said plat showed that the land was swamp and overflowed. There was no evidence of the filing of such declaration since this application. Judgment was rendered in favor of the defendant in the Court below, and the plaintiffs appealed from the judgment and from an order denying a new trial.

The Court below directed the jury to find for the defendant if they found the land not to be swamp and overflowed, and also found that the defendant had a valid preëmption right to the land.

The other facts are stated in the opinion of the Court.

John B. Hall, for Appellants.

Since this case was on appeal to this Court (23 Cal. 431) at the October term, 1863, the survey of the township has *been made and approved, and the plat filed in the [334] proper office of the Government.

It was incumbent on the defendant, under the preëmption laws, in order to acquire an incipient right, that he should have filed his declaratory statement *within three months* from the date of the receipt at the local Land Office of the approved plat of the township. (Act of March 3d, 1853, sec. 6; act of May 30th, 1862, sec. 7.)

Although the defendant's possession *began in trespass* upon land forbidden to the settler because then unsurveyed, yet the prior adjudication recognizes the acquisition of a right as to a *bona fide* settler. Yielding to the law of the case as then declared by the Court, it is respectfully insisted that the respondent does not *now* stand so well in Court. He has not complied with the statutory condition which is indispensably essential to a continuation of his right: he has not effected a filing of the required declaration, and the right falls for want of this support.

The settler's incipient right, say the Federal Supreme Court, (Lytle *v.* State of Arkansas, 9 Howard,) is "subject to be defeated by a failure to perform the conditions annexed to it."

The officers of the department charged with the administration of the public land, have taken the same view, and

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have practically enforced it from the earliest period of the preëmption system. (See Instruction of Commissioner Blake, of September 28th, 1842, and May 8th, 1843; Lester's Compilation, Nos. 410, 411, pp. 369, 370; Commissioner Hendrick's Instructions to Register at San Francisco, of December 8th, 1857.)

The settlement of the defendant was a privilege, burdened with the duty of the party admitted to its enjoyment of making or causing to be made the record thereof, and in default that his relation to the Government and to the premises shall become extinct.

We anticipate the reply to the foregoing proposition. It will be found in the doctrine, as it will be said, an-
[335] nounced in *the case itself when first passed upon by the Court, at pages 442 and 443 of 23 Cal., and also in what was said by the same tribunal in Robinson v. Forrest, 29 Cal. 320.

With respect to the latter case, it needs only to be said that for aught that appears the defendant had complied with the condition in question; for his rejected offer embraced proof of performance of all the requirements of such laws down to the then present time, and the record presented the fact of the filing of the approved plat in 1864. (29 Cal. 319.)

Before the Government survey was filed, it cannot be questioned that the defendant was powerless to make the statutory record, for until that event the officer was equally powerless to act; hence the Court said, "he has done all in his power, and has lost no rights acquired under these laws." But the Register's refusal to accept his single application, soon after the plat was returned, without anything further being done by the applicant from that time until the trial below—a period but little short of two years—cannot be deemed a sufficient measure of diligence under the most liberal rule obtaining in matters of this or analogous character.

The act of the Government evidencing its approval of the State's claim remained in the local office for nearly a year after the rejection of defendant's offer, without a renewal of the application or an appeal from the Register's decision, or other steps taken to procure admission to the asserted right

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of *filing* on the land. The right of formal appeal to the Commissioner, or the privilege of presentation of his claim by communication to the department without the intervention of the local officers, were certainly open to him; and in addition to these, a remedy, perhaps, through the Court, might have availed him. At all events, a resort to either or all of these modes of procedure would have afforded proof of *good faith* in the assertion of his claim, and for his failure in this regard the Government, as we have seen, adjudges that his claim lacks that indispensable element, and declares it null and void. (Opinion of Attorney-General Speed—"Suscol Rancho," May 26th, 1866.)

*And in this connection it should be observed that [336] the withdrawal of the plat did not trammel the claimant's pursuit of the supposed right, nor, if it has, does it appear that such withdrawal was by the procurement or agency of the State or its vendees, the plaintiffs.

Therefore, as between the Government and the defendant, the relation created by the settler's occupation of and residence upon the land has been dissolved, and can only be revived *ex gratia*, and not *de jure*. As between the State, or the appellants, its successors in interest, and the defendant, the principle should apply with increased force, the State standing in the position of a party claiming title also from the common source, and chargeable with no color of bad faith, or *laches*.

J. H. Budd, for Respondent.

A *bona fide* settler on unsurveyed public lands of the United States, under the preëmption laws, and who has complied with such laws so far as in his power, and is qualified as a preëmptor, has a right in an action of ejectment to show by proof that the lands so settled on are not swamp and overflowed, even against one claiming the same as swamp and overflowed under a patent from the State of California. (Kile *v.* Tubbs, 23 Cal. 442; Kile *v.* Tubbs, 29 Id. 402; Robinson *v.* Forrest, 29 Id. 317.) The Supreme Court has so decided on previous appeals in this action, and such is now the law of the case. (Clay *v.* Hoagland, 6 Cal. 687; Cahoon *v.* Levy, 10

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Id. 216; Davidson *v.* Dallas, 16 Id. 82.) The misconduct or neglect of a public officer does not deprive a *bona fide* preëmptor of his rights. (Lytle *v.* State of Arkansas, 9 How. 314; Allison *v.* Hunter, 9 Mo. 741; Lester's Land Laws, 415, No. 471.) In the case in Lester, the refusal on the part of the Register was in 1855, and the decision of the Secretary of the Interior in 1859, four years after.

In ejectment, plaintiff must have the legal title and right of possession at the time of the commencement of the ac-
[337] tion. *(1 Chit. Pl. 191; 2 East, 257; 17 East, 210; Yount *v.* Howell, 14 Cal. 468; Garner *v.* Marshall, 9 Id. 270; 11 Gill. & J. 351; McCulloch *v.* Cowher, 5 Watts & S. 427; Alden *v.* Grove, 18 Penn. 377; 3 McLean, 202; 6 Mon. 259.)

If the land in contest were not swamp and overflowed lands at the time of the passage of the act of Congress of September 28th, 1850, then the United States did not by that act grant the land to the State of California, and the State derived no title to the land from that act, and could not convey any. If the State has derived any title to the land by acts of Congress passed since the commencement of this action, such title cannot be available for plaintiffs in this action. (See cases above cited.)

If the defendant at the time of the commencement of this action had a right as a preëmptor to the possession of the lands in contest, adverse to the plaintiffs claiming the same under their patent from the State, then plaintiffs could not at the same time have a right to the possession of the same, under their patent, as against defendant; and a right of possession subsequently lost by defendant or acquired by plaintiffs cannot, at least under the pleadings, be made available for plaintiffs in this action. (See cases above cited.)

In case plaintiffs have acquired or shall acquire, since the commencement of this action, a legal title and right of possession to the land in contest, such title and right of possession may be made available for them in another action, but not in this, in which defendant has expended large sums of money in the *bona fide* defence of his rights existing at the commencement of this action. It would be manifest injustice to con-

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demn defendant to pay costs to his ruin, by reason of any acts of Government or its officials since the commencement of this action. A judgment in the action of ejectment, so far as it affects the land, determines only the plaintiffs' right to the possession of the land at the time of the commencement of the action. (Yount *v.* Howell, 14 Cal. 468; Garner *v.* Marshall, 9 Id. 270.)

*By the Court, SHAFTER, J.: [338]

Ejectment for one hundred and sixty acres of land, it being the southwest quarter of section eleven in a certain township in the county of San Joaquin.

The plaintiffs claimed the premises under a State patent issued to them in June, 1862. The lands are described in the patent as "swamp and overflowed." The defendant claimed the same lands under the preëmption laws of the United States, and on the ground of privity with that paramount source of title he was allowed to put in evidence for the purpose of showing that the lands included in the patent were not swamp and overflowed on the 28th of September, 1850, the date at which lands of that character belonging to the Republic were granted by act of Congress to the States in which they were situated.

First. It is admitted by appellants that the relations of the defendant to the land, and through it to the United States, were such at the commencement of the action as to entitle him to show that the lands were not swamp and overflowed, and to claim that the patent was null and void on that ground as to the State and as to him. That point indeed was directly passed upon in this action on a former appeal, and the decision now constitutes the law of the case. (Kile *v.* Tubbs, 23 Cal. 431.) But appellants insist that the relation of the defendant to the land and to the Government has undergone a change *pendente lite*, so that the defendant has lost the *status* (Doll *v.* Meador, 16 Cal. 295) by virtue of which alone he was allowed at the former trial to attack the patent.

It is unnecessary to consider the special facts on the ground of which the plaintiffs claim that the defendant, though confessedly in privity with the Government at the commencement

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of the action, and therefore authorized at that time to allege and prove a better title from the common and paramount source than that manifested by the plaintiffs, is disabled from doing the same thing now. The point may be met and disposed of in a more general, but not less direct way.

[339] The *alleged disability does not come of any judicial order or stipulation in the action, nor is it referable to any description of conventional arrangement between the parties. They have held each other at arm's length from the beginning. It is enough to say that if the plaintiffs had no right of entry as against the defendant when the action was commenced, they cannot by possibility have since acquired the right to bring it then. In other words, if the plaintiffs could not have turned the defendant out at the date of the suit, it is not within the bounds of legal possibility that they can have the right to do it now—in this action. To a recovery in ejectment, the plaintiff must not only have a right of entry at the trial, but must have had it when the suit was brought.

Second. It is claimed that the evidence is insufficient to justify the verdict.

The only specification under this head necessary to be considered is that there was no proof that the land was swamp and overflowed. We have examined the testimony attentively, and in the light thrown upon it by the critical analysis to which the counsel of both parties have subjected it. While we think the verdict against the weight of evidence, still when tested by the settled doctrines of this Court, the case is not one that would justify an assertion of our own views in opposition to the verdict of the jury and the ruling of the Court before which the cause was tried.

Judgment affirmed.

Mr. Justice RHODES did not express any opinion

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CANDELARIO VALENCIA AND PAULA VALENCIA, HIS WIFE, v. JOHN COUCH.

COMPLAINT IN FORCIBLE ENTRY AND DETAINER.—Forcible entry and forcible detainer are separate causes of action, and ought to be separately stated in different counts in the complaint. If not so stated in the complaint it is bad on demurrer, but if the complaint is not demurred to the objection is waived.

[1] PLEADINGS IN FORCIBLE ENTRY AND DETAINER.—The offences mentioned in the *Forcible Entry and Detainer Act should be separately stated in the com- [340] plaint; and fraud, if relied on, should also be separately stated.

AMENDMENT TO COMPLAINT.—If the plaintiff sues upon one only or upon two of the causes of action mentioned in the Forcible Entry and Detainer Act, and the testimony makes a cause of action named in the act, but not set out in the complaint, it is the duty of the Court on its own motion, or on the motion of the plaintiff, to permit him to amend his complaint to suit the testimony.

AMENDMENTS TO PLEADINGS.—A motion to amend a complaint does not come too late because made after the plaintiff has closed his testimony and the defendant has moved for a nonsuit. A motion to amend is always in time when it immediately follows an objection to the complaint or answer.

POSSESSION OF LOT.—A person has possession of a lot twenty-eight feet by one hundred and thirty-two sufficient to enable him to maintain forcible entry and detainer, if it adjoins a lot on which he lives, and has a stable on it, and he cultivates it, even though the fence inclosing the whole is not very substantial.

ENTRY UPON ANOTHER'S POSSESSION.—One entering upon a lot in the possession of another does not effect a complete entry and acquire possession until he has expelled the party in possession and effected an exclusive lodgment.

FORCIBLE ENTRY.—For the purpose of determining whether an entry is forcible, all that transpires between the parties from the time of the coming of one until the going out of the other is to be taken into account.

WHAT CONSTITUTES FORCIBLE ENTRY.—One who goes to a lot in another's possession, accompanied by several men, and builds a fence around it, while the former possessor is remonstrating, and removes him from the line of the fence where he places himself to prevent the fence from being built, is guilty of a forcible entry.

APPEAL from the County Court, city and county of San Francisco.

The facts are stated in the opinion of the Court.

W. W. Chipman, for Appellants,

Upon the question of the force required to constitute a forcible entry, cited McCauley *v.* Weller, 12 Cal. 524; Milner *v.* Maclean, 2 Car. & P. marg. p. 17; Jacob's Law Dic., title

[1] Approved, Shelby *v.* Houston, 38 Cal. 419.

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Forcible Entry; Fremont v. Crippen, 10 Cal. 214; and Dickenson v. McGuire, 9 Cal. 49.

G. F. & W. H. Sharp, for Respondent,

Upon the same point, cited House v. Kaiser, 8 Cal. 501; Thompson v. Smith, 28 Cal. 527; Polack v. McGrath, 25 Cal. 58; and Merrill v. Forbes, 27 Cal. 370.

[341] *By the Court, SANDERSON, J.:

This action was brought to recover possession of a lot, thirty-eight by one hundred and thirty-two feet, in the city of San Francisco, under the provisions of the act of the 2d of April, 1866, in relation to forcible entries and unlawful detainers. (Stat. 1865-6, p. 768.) The case was tried by the Court without a jury. At the close of the testimony on the part of the plaintiffs, the defendant moved for judgment of nonsuit. Thereupon the plaintiffs moved for leave to amend their complaint by adding thereto a further or distinct cause of action for a detainer. The latter motion was denied and the former granted. The plaintiffs then moved for a new trial upon a statement first prepared and settled for that purpose. This motion was denied, and plaintiffs have brought the case here by an appeal taken from the order denying a new trial.

On the part of the appellants, it is claimed—first, that the Court erred in denying their motion for leave to amend; and second, in granting a nonsuit.

The original complaint contains but one count in which the possession of the plaintiffs is alleged—a forcible entry by the defendant, a forcible detainer, and a demand by the plaintiffs for the possession, made on the 28th of August, 1866. So far as we have been able to discover, there is no material difference between the averments of the original complaint and those contained in the proposed amendment, except as to the date of the demand, which is stated in the proposed amendment as the 28th of June, 1866; but this must be a mistake, for the entry is alleged to have taken place on the 9th of July, subsequent to the alleged demand, and the notice or demand, which was in writing and is in the record which has been brought up, bears date on the 25th of August, 1866;

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besides, Cardinell, who served the notice on the defendant, testified that he served it on the 28th of August, 1866. The only object, therefore, which counsel seems to have had in asking for leave to amend was to state the entry and the detainer in separate counts, as distinct and separate causes of *action, and also to make the complaint con- [342] form to every possible aspect of the testimony. We are asked whether, if in an action of this character the plaintiff relies upon a forcible entry and also upon a forcible detainer, it is necessary for him to allege them in separate counts, or whether it would be sufficient to allege both in one count in the manner in which they are alleged in the original complaint in this case; and, if it is necessary to state them in separate counts, we are further asked if the plaintiff is not entitled to amend, as a matter of absolute right, under the tenth section of the act in question, where he has not stated them separately, or where he has failed to state them both, and the testimony shows a right to recover upon the one not stated.

The act in question expressly provides that all proceedings for the trial and determination of causes of action arising under its provisions, not therein provided for, shall be regulated by the provisions of the Civil Practice Act, so far as the same may be applicable. (Sec. 7.) Upon the question in hand the act is silent, and the Civil Practice Act must therefore supply the rule. Forcible entry and forcible detainer are distinct offences, or separate causes of action, (secs. 1, 2, 3,) and ought therefore, according to the provisions of the Civil Practice Act, to be separately stated. (Sec. 64.) If not so stated, the complaint would be bad on demurrer, (sec. 40,) but if not demurred to, the objection would be waived. (Sec. 45.) In this case, the defendant did not demur. The objection was therefore waived by him, and there was no reason why the plaintiffs should amend for the purpose of stating the entry and detainer in separate counts.

The act in relation to forcible entries and detainers defines two offences: First—Forcible entry; Second—Forcible detainer. Of the latter, however, two distinct definitions are given, (secs. 1, 2,) so it may perhaps be more correct to say

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that the act defines three offences, two of which bear the same name. The act also provides that fraud on the part of the defendant, if it exists, may constitute a special feature of each offence, and that the plaintiff may recover special [343] *damages therefor. (Sec. 5.) We have, therefore, as causes of action, or grounds of relief: First—Forcible entry; Second—Forcible detainer, as defined in the second section; Third—Forcible detainer, as defined in the third section; and Fourth—Fraud as an adjunct of each of the former. (Sec. 5.) All may be united in the same complaint, but should be separately stated. If fraud is relied on, the facts constituting it should also be separately stated, for it is a ground for distinct relief. If the plaintiff, however, sues upon one only, and the testimony makes another, or if he sues upon two, and the testimony makes the third, it is the duty of the Court, of its own motion, to order the complaint to be amended to suit the testimony. (Sec. 10.) But if in the opinion of the Judge the testimony makes no case under either, which seems to have been the case here, there is no reason why he should order an amendment, or allow one if asked for. He has the same power over the question which he has over all other questions with which he deals, and is only bound to decide according to his judgment. Undoubtedly the statute is most liberal on the question of amendment, and the Court should not be less, and doubtless if there is any reasonable controversy about what the testimony establishes, the better and safer practice would be to allow counsel to amend so as to be able to present his case in accordance with his own judgment or theory. By such a course no error will intervene, and the manifest spirit of the statute will be fully observed. Moreover, in case of further proceedings on appeal, the case would then come up entire, and on the other hand the amendment, if not demanded by the exigencies of the case, would certainly do no harm. But, as already intimated, we are unable to perceive any necessity for an amendment in this case, arising out of the omission to state the causes of action separately, or out of any supposed variance between the complaint and the testimony, and for that reason we are of the opinion that the Court did not err in denying

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the motion. The motion to amend, however, did not come too late, as suggested by counsel for defendant, because it was not made until after the *defendant's motion for [344] a nonsuit. A party cannot be deprived of his right to amend because his adversary chooses to take advantage of any defect in his complaint on motion for a nonsuit instead of by a demurrer. A proposition to amend is always in time when it immediately follows the objection to the sufficiency of the complaint or answer.

We are of the opinion, however, that the plaintiffs' testimony made a *prima facie* case of forcible entry, and that the Court erred in granting a nonsuit.

The actual possession was shown to be in the plaintiffs. They had a stable upon the lot, which was adjoining the lot upon which they were living. The lot was being cultivated by them at the time—in part as a vegetable garden, and its exterior lines were fenced, though not, perhaps, in a very substantial manner. The lot was small, being only thirty-eight by one hundred and thirty-two feet, and if not a part of the plaintiffs' house lot was immediately adjoining it, without any fence between the two. These circumstances, taken in connection with the inclosure, such as it was, the stable upon the lot, and the actual cultivation of the lot as a garden, was sufficient to establish an actual exclusive possession in the plaintiffs. On this head we find nothing in the testimony which warrants the theory of defendant, that the possession shown was interrupted and scrambling, within the case of House *v.* Kaiser, 8 Cal. 499.

Upon the question of force, counsel for defendant seem to assume that the entry was complete the moment defendant and his party put their feet upon the premises; and inasmuch as that was accomplished without knocking anybody down, or threatening to do so, with a show of sufficient force, the entry must be held to have been peaceable. We do not so understand it. The entry of defendant was not complete until he had expelled the plaintiffs and effected an exclusive lodgment, which was not done until after he had knocked some boards off the fence, with which he had inclosed both

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the lot and Mrs. Valencia, and let her out with a rap upon her knuckles with his hammer. Until then, he had not [345] *obtained an exclusive possession of the premises and the entry was not complete. Until then, his entry had been contested by Mrs. Valencia, who had protested against his acts in putting up the fence, and had resisted him so far as a woman opposed by eight men could be expected to do so. Two hostile parties cannot be in possession of the same premises at the same time, and the possession is not changed until the invaders have expelled the former occupants.

For the purpose of determining, then, whether the entry in this case was forcible or not, within the meaning of the statute, all that transpired, between the coming of the defendant and the going of Mrs. Valencia, is to be taken into account.

It appears that Valencia himself left the premises about the time the defendant and his party came. It is true he says, on cross-examination, that he did not leave because he was afraid, but having business somewhere else, he left. Mrs. Valencia, however, remained, so the defendant did not find the place unoccupied. He came attended by six or seven other men. That all did not come for the purpose of building a fence is manifest, from the fact that the number was unusually large for that purpose, and the further and significant fact that only two or three of them engaged in that business, while the others seemed to play the part of a body guard. True, some of them appeared to be men "of infinite jest," who found food for fun in the tears and remonstrances of a woman; but others were not void of sterner stuff, for when it became necessary to remove the person of Mrs. Valencia from the line of the fence which they were building, smiles and jests gave place to passion and force. When she took hold of the fencing materials for the purpose of preventing their use, as she lawfully might do, they were forcibly wrested from her. When she placed herself over the post-holes, with intent to prevent the construction of the fence, and refused to move out of their way, as she had a lawful right to do, they laid violent hands upon her and forcibly re-

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moved her. It is true that when, notwithstanding her remonstrances and resistance, the defendant and *his [346] party had succeeded in inclosing the lot and Mrs. Valencia with a fence, and she had determined to abandon the contest and withdraw from the field, the defendant knocked off two or three boards to afford her a place of exit. This cannot be accepted, however, as an act of gallantry, notwithstanding it is claimed as such by counsel for defendants, especially when we find it accompanied by a rap upon her knuckles with his hammer. Having been given with a hammer, and with force sufficient to leave a wound, the law cannot regard the blow as playful, though it may have been accompanied by the bow of a Grandison or the smile of a Chesterfield. A blow is no less a blow because it is dealt with a smile or pointed with a jest.

We have, then, an actual and peaceable possession on the part of the plaintiffs—an invasion by the defendant with a multitude of people not needed for the purpose of taking peaceable possession of his own—not only a show of force, but its actual use in repeated instances while engaged in effecting an entry and ouster. To hold, in view of these conditions, that the plaintiffs are entitled to no relief under the statute against forcible entries would be to join the defendant and his party in laughing at a woman vainly struggling with a superior force for her legal rights, and in setting at defiance the plainest and most salutary provisions of law.

It is suggested by counsel that the Court below was controlled in its judgment by the case of Thompson v. Smith, 28 Cal. 527. We find no parallel between that case and this, and we think the difference between them too obvious for comment.

Judgment and order reversed, and new trial ordered.

Neither Mr. Chief Justice CURREY nor Mr. Justice RHODES expressed any opinion.

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[347] *THE SAVINGS AND LOAN SOCIETY v. WM. THOMPSON, JR.

A MONTH.—The month contemplated by the statutes of this State is a calendar and not a lunar month.

[1] PUBLICATION OF SUMMONS.—A publication of a summons weekly against a non-resident defendant, commencing on the 10th day of January, and ending on the 9th day of April, is a publication of three full calendar months, and the first day of the forty within which the defendant is required to answer is the 10th of April.

IDEM.—If the last day of the publication of a summons is in the same week in which the three months expires, the publication is sufficient to give the Court jurisdiction, although this day is less than three months from the first day of publication.

PUBLICATION OF SUMMONS ON SUNDAY.—If some of the publications of a summons, including the last, are made on Sunday, in the regular issues of the paper, it does not vitiate the service.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

B. S. Brooks entered into a covenant with the defendant, by which Brooks covenanted to sell the defendant a lot in San Francisco, and defendant covenanted to pay him a sum of money when Brooks should procure a judgment against Flanegan and Stevens, and Gorham as assignee in insolvency of Samuel L. Dennison, and their heirs and assigns, quieting the title to the land. Brooks procured the required judgment by publication of summons. He then assigned the covenant to the plaintiff, and this suit was commenced to obtain judgment on the same.

On the trial, plaintiff offered in evidence the judgment roll in the action to quiet title, and defendant objected to its being received in evidence, because the Court had not acquired jurisdiction by the publication of summons. The Court overruled the objection. Plaintiff recovered judgment, and the defendant appealed.

The other facts are stated in the opinion of the Court.

Wm. M. Pierson, for Appellant.

In computing time in the Practice Act the first day is to be

[1] Cited, State v. Yellow Jacket S. M. Co., 5 Nev. 426.

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excluded. (Pr. Act, sec. 530.) If the last day be *Sunday, it shall be excluded. (Ib.) And the day of [348] service shall also be excluded. (Pr. Act, sec. 24.) The publication commenced therefore on the 11th of January and ended on the 8th of April. Even disregarding this provision of the Practice Act, the publication fell short one day of three calendar months. We contend that the full period of three months must elapse between the first and last publication. No other construction fulfils the language "provided that publication *shall not be less than three months*." (Pr. Act, sec. 31; Bunce *v.* Reed, 16 Barb. 347; People *v.* Gray, 10 Abb. Pr. 468; Early *v.* Doe, 16 How. 610.) But if the publication was sufficient, it resulted in a service on Sunday. Such service is void. (Judiciary Act, Stat. 1863, p. 343; Field *v.* Park, 20 Johns. 140; Merritt *v.* Earl, 31 Barb. 38; Croghan *v.* Livingston, 25 Barb. 339; Davis *v.* Fish, 1 Green, Iowa, 411; Whitney *v.* Butterfield, 13 Cal. 341.)

B. S. Brooks, for Respondent.

The five hundred and thirtieth section of the Practice Act is: "The time within which an act is to be done, as provided in this act, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded." As there was not in this proceeding a "time within which an act was to be done," the section has no relevancy. There is a time "*within which*" the defendant would have to answer, and to that period of time this section would apply. Section twenty-four of the Practice Act provides that the day of service of the summons shall be excluded. What is the day of service of the summons? "In either case, the service of the summons shall be deemed complete *at the expiration of the time prescribed by the order for publication*." (Pr. Act, sec. 31.) The time did not expire till the 10th of April, Monday. The appellant's counsel contends "that the full period of three months must elapse between the first and last publication." The authorities which he cites do not sustain his position, and there are others which are decidedly against him. By the Pr. Act (sec. 31) the summons is *required to be published once a week for three months, [349]

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and the question is, what is meant by this phrase? The position which we assume is that publication on one day in each week during the three months is sufficient. (Ronkendorff *v.* Taylor, 4 Pet. 361; Sheldon *v.* Wright, 7 Barb. 46; Bachelor *v.* Bachelor, 1 Mass. 255.) But, secondly, is the matter of publishing a summons in a newspaper a judicial proceeding in the sense of the Judiciary Act? In Macnally's Case (9 Coke, 67 *a*) it was declared that ministerial acts could be done on Sunday. In the case of Swann *v.* Broome, 1 W. Blacks. 526, is a very curious discussion of the history of the matter, and of what things may and may not be done on Sundays; from which it appears that many acts relating to proceedings in Courts may be done on that day, by a canon of the church and an imperial edict still extant in the Theodosian Code, and by the laws of Edward the Confessor; and ever since that time Sunday was *dies non juridicus*. The matter is also fully discussed in Strong *v.* Elliot, 3 Cow. 29, where it was held that, though an award cannot be given on that day any more than a judgment, yet a *verdict* may be recorded on that day. The same was held in Van Cortlandt *v.* Underhill, 15 Johns. 416. In Hotaling *v.* Osborn, 15 Johns. 119, there was a verdict and judgment on Sunday. The Court say: "It was proper to receive the *verdict*, presuming that the jury were impanelled before Sunday commenced; but it was illegal to enter the judgment on Sunday." To the same effect is Butler *v.* Kelsey, 15 Johns. 177; Hindehaper *v.* Cotton, 3 Watts, 56; Van Riper *v.* Van Riper, 1 South. 156; Baxter *v.* People, 3 Gilm. 385; Cory *v.* Silcox, 5 Port. Ind. 373; Heller *v.* English, 4 Strob. 586; True *v.* Plumley, 36 Me. 1 Heath, 466; Webber *v.* Merrill, 34 N. H. 202, and McCorckle *v.* State, 14 Ind. 39.

[350] *By the Court, SAWYER, J.:

The only question in this case is whether a summons was published "once a week," not less than "three months," within the meaning of the provisions of the thirty-first section of the Practice Act. It was published on the 10th, 15th, 22d, and 29th of January; the 5th, 12th, 19th, and 26th of February; the 5th, 12th, 19th, and 26th of March, and the 2d

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and 9th of April, 1865—the first publication being on the 10th of January, and the last on the 9th of April.

The month contemplated by the statute is a calendar, not a lunar month. (Sprague v. Norway, 31 Cal. 173.) This is conceded.

The five hundred thirtieth section of the Practice Act has no application. There is no time "within which an act is to be done," within the meaning of that section.

The defendant being a non-resident of the State, the summons must be published "at least once a week," and the publication "shall not be less than three months." From the 10th of January to the 9th of April, inclusive, are three full calendar months. We can no more include the 9th of January, or the 10th of April, in the intervening three calendar months, than we can get two Sundays or two Saturdays into one week. The publication was made on the 10th of January and on the 9th of April, and once in every intervening week, making in all a publication in each of fourteen consecutive weeks. The period of publication, then, covered the entire period of three calendar months. The publication, therefore, could not be "less than three months." If the language of the statute had been, that "the summons shall be published daily, and the publication shall not be less than one month," and a summons had been published on every day in the month of January, for example, we apprehend that no one would contend that it had not been published a full month. The cases cited are not upon precisely similar provisions, and are not in point. Neither does the point decided in any one of them sustain the precise view maintained by appellant.

The *cases arise upon notices of Sheriff's sales, notices [351] in insolvent cases, etc., under statutory provisions requiring notice to be published "weekly for six weeks," "three months," and the like, as the case may be, before some act to be done on a designated day of which notice is given. In no one of the cases was it held that the "six weeks" or "three months" must elapse between the first and last publication, or that the notice had not been published a sufficient number of times, or to a sufficiently late day. No such question was in any of the cases. The difficulty was, not that the notice

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had not been published the full number of times, or to a sufficiently late day, but that sufficient time had not elapsed between the first publication and the time appointed for doing the thing of which notice was given. Take for example the case of Early *v.* Doe, 16 How. 611, which was a tax sale. The statute required notice of the sale to be published "once in each week for at least twelve successive weeks." The day of sale appointed by the notice was the 15th of November, 1848. The first and last publication were on the 26th of August and the 15th of November—the day of sale; and the Court in their calculation include both days. From the 26th of August to the day of sale and last publication—the 15th of November—there were but eighty-two days—not twelve full weeks, or eighty-four days. Now the difficulty was, as stated by Mr. Justice Nelson, not that the notice had not been published a sufficient number of times, or continued to a sufficiently late period, but that twelve full weeks' notice had not been given—that is, twelve weeks from the first publication to the day appointed for the sale, which happened in this instance to be the last day of publication also. (Ib. 615–16.) But suppose the day appointed for the sale had been the 18th of November, instead of the 15th, and the publication had been precisely the same as it was—the last falling on the 15th, and that it was in the same week with the 18th—there can be no doubt that the sale would have been upheld. There would, then, clearly have been twelve full weeks' notice from the first publication to the day of sale, and the notice would [352] have been *published once in each week embraced in that period; yet there would have been no more time between the first and last publication than there was in the case as it is presented. That such would have been the ruling in the case supposed is evident from the reasoning in the case cited and the decision of the same Court construing the words "once a week," in Ronkendorff *v.* Taylor, 4 Pet. 361. The questions presented in the other cases cited by the respective counsel are similar to that in Early *v.* Doe. They are: Sheldon *v.* Wright, 7 Barb. 45; same case affirmed on appeal, 5 N. Y. 517; Olcott *v.* Robinson, 20 Barb. 149; same case reversed in 21 N. Y. 153; Chamberlain *v.* Dempsey, 13 Abb.

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Pr. 422; Bachelor v. Bachelor, 1 Mass. 256; Bunce v. Reed, 16 Barb. 351; People v. Gray, 10 Abb. Pr. 469; Anonymous, 1 Wend. 90. These cases are in conflict upon the points to which they are cited, and the later cases in the Court of Appeals appear to be against appellant. But none of the points decided are inconsistent with the views we have expressed in this case, and it is unnecessary now to determine which is right. In these cases, the Judges take care to confine their decision to the point that the full time required by statute must intervene between the first publication of notice and the day appointed for the performance of the act designated in the notice.

We think that the summons had been published for three calendar months at the close of the 9th day of April, and that the first day of the forty within which the defendant was required to answer was on the 10th of April. But even if the three months for publication did not expire till the 10th of April, there was no necessity for another publication. The 10th was in the same week with the 9th, and the summons had been published in that week. It had been published once in every one of the weeks that could by any possibility, in whole or in part, be brought into the three calendar months. This is sufficient under the decision in Ronkendorff v. Taylor, 4 Pet. 361, and we know of no decision to the contrary. The only difference it could make would be that the forty days within which the defendant is required to answer *would not commence to run till the 11th, in- [353] stead of the 10th, for then the service would not be complete till the expiration of the 10th. The summons does not arbitrarily fix the day for answering, but requires the defendant to answer within a given number of days after the service of summons. (Pr. Act, secs. 24 and 25.) The day for the defendant to act is left open by the summons, depending upon the time when the service is made, or is complete. It is a matter of no consequence, then, whether the service was complete on the expiration of the 9th or 10th of April, for the time within which to answer did not begin to run till service was complete. The judgment in the case was not rendered till the 26th of December, 1865, long after the

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time for answering expired, whether it commenced to run on the 10th or 11th. When the default was entered does not appear, and the presumption is, nothing to the contrary appearing, that it was not entered till due. On either hypothesis, therefore, there was a valid service.

Some of the publications, including the last, were on Sunday—the paper in which publication was made being regularly issued on Sundays as well as on week days. We do not think this fact vitiates the service on the ground that, under our statute, Sunday is *dies non*. The service is not actual and is not made by a single act. It consists of a series of acts running through a long period of time, and the specific acts required by the statute have been performed according to both the letter and spirit of its provisions.

The judgment is affirmed.

Mr. Justice RHODES did not express any opinion.

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[354] *E. RONDELL *v.* CALEB T. FAY et als.[1]

EVIDENCE OF INCORPORATION.—Testimony tending to show that a company is a corporation *de facto*, dispenses with strict proof of the corporate character, and precludes the party offering it from afterwards disputing the company's right to act as a corporation.

TESTIMONY AS TO CORPORATE CHARACTER.—If the plaintiff, in his opening, introduces testimony tending to show that a company is a corporation *de facto*, he cannot object to defendant's testimony as to the strict corporate character of the company.

[2] RIGHT TO ACT AS CORPORATION.—An inquiry as to the right of a company to act as a corporation, can only be had at the suit of the State on information by the Attorney-General.

VOID PATENT.—If a patent for land shows upon its face that it is void, it may be attacked, either directly or collaterally, by any party interested in disputing its validity.

PATENT VOID UPON ITS FACE.—If a patent shows that it was issued in the absence of legislation directing a sale of the property described, it is void upon its face.

A PATENT GOOD IN PART AND BAD IN PART.—If the law authorizes the sale of such land only as is under water at ordinary high tide, and belongs to the State

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[1] Same case, Cal. Sup. Ct., Apl. T., 1874, not reported.

[2] Approved, Pacific Bank v. De Ro, 37 Cal. 541. Cited, Swartwout v. Michigan Air Line R. R. Co., 24 Mich. 394.

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by virtue of its sovereignty, and the patent conveys both swamp and overflowed lands, held by the State under the Arkansas Act, and lands owned by the State by virtue of its sovereignty, the patent is good in part and bad in part.

SALT MARSH LANDS. — The term "salt marsh lands" in the legislation of this State, applies to a certain class of swamp and overflowed lands held by the State under the Arkansas Act.

TIDE LANDS. — The descriptive phrase "tide lands" in the legislation of this State, applies to land covered and uncovered by the ordinary tides, which the State owns by virtue of its sovereignty.

PARTY RELYING ON PATENT GOOD IN PART. — If a patent is good in part and bad in part upon its face, and in its description of the land does not separate the good part from the bad, the party relying upon it must show himself within its good call.

APPEAL from the District Court, Twelfth Judicial District, city and county of San Francisco.

The following is the patent offered in evidence by the defendants:

"Whereas, the Legislature of the State of California, on the fourth day of April, A. D. one thousand eight hundred and sixty-four, passed an act, entitled 'An Act to authorize the sale and conveyance to the North San Francisco Homestead and Railroad Association of certain overflowed lands in the city and county of San Francisco,' which act authorizes the *location and disposal of a portion of the [355] overflowed and tide lands, belonging to the State by virtue of her sovereignty; and, whereas, it appears by the certificate of Register of the State Land Office, No. 15, bearing date June 7th, A. D. one thousand eight hundred and sixty-four, that he has been duly notified by the State Treasurer that the North San Francisco Homestead and Railroad Association has paid four hundred and forty-six 25–100 dollars to the State of California, in full payment for one hundred and forty-eight and seventy-five one hundredths acres of State salt marsh and tide lands, situated in said San Francisco county, and described as follows, to wit:

"'Survey No. 15, State Salt Marsh and Tide Lands, San Francisco, Township No. 1, S., 5 W. Range, Mount Diablo Meridian, Sections 31 and 32—fractional parts thereof, more particularly described in field notes of said survey, as follows:

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"'Beginning at the stone monument set for the centre of Devisidero and Chestnut streets, which point is 26.98 chs. north, and 0.33 chs. east of the southeast corner of Section 31. Runs south 77 degs. east 6.00 chs., south 3.00 chs., south 75¾ degs. west 6.44 chs., north 68¾ degs. west 13.44 chs., north 82½ degs. west 6.98 chs., to line of Government Reserve; run on said line north 7½ degs. west 17.66 chs.; thence south 81¾ degs. east 3.88 chs., north 86 degs. east 8.05 chs., south 39 degs. east 9.67 chs., south 59½ degs. east 4.52 chs., north 16 degs. east 6.53 chs., east 0.53 chs., north 41½ degs. west 19.53 chs., north 38 degs. west 4 chs., north 62½ degs. west 7.45 chs., north 79 degs. west 4 chs., to the Government Reserve line; run on said line north 7½ degs. west 5.68 chs.; thence south 72¾ degs. east 19.85 chs., south 64 degs. east 9.13 chs., north 81½ degs. east 30.63 chs., south 8¾ degs. east 15.63 chs., south 39 degs. west 1.18 chs., south 56½ degs. west 5.55 chs., south 60½ degs. west 10 chs., south 74 degs. west 0.38 chs., south 6.37 chs., south 69½ degs. west 9.87 chs., north 83½ degs. west 10 chs., south 10½ [356] degs. west *2.75 chs., to the place of beginning. Run by the true meridian: magnetic variation, 16½ degs. east.'

"Now, therefore, all the requirements of the act of the State Legislature, in relation to swamp and overflowed lands, having been fully complied with—

"I, Frederick F. Low, Governor of the State of California, by virtue of authority in me vested, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said North San Francisco Homestead and Railroad Association, all the above described lands, with the appurtenances thereto belonging, to have and to hold unto the said association, its heirs and assigns, forever.

"In testimony whereof, I, Frederick F. Low, Governor of the State of California, have caused these letters to be made patent, and the seal of the State of California to be hereunto affixed.

"Given under my hand, at the city of Sacramento, this,

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the twenty-third day of June, in the year of our Lord, A.D. one thousand eight hundred and sixty-four.

{SEAL} [Signed:] "FREDERICK F. LOW,
"*Governor of State.*

Countersigned:
"Attest: B. B. REDDING,
"*Secretary of State.*

{SEAL} [Signed] "J. F. HOUGHTON,
"*Register of State Land Office.*
"By A. S. BENDER, *Deputy.*"

On the trial, the plaintiff, to make out his case, introduced as a witness McNabb, one of the defendants, who testified as to pulling down of fences on the *locus in quo*, and that he was hired by the North San Francisco Homestead and Railroad Association. The jury found a verdict for the defendants.

The other facts are stated in the opinion of the Court.

Cutter & Washington, for Appellant.

*By the terms of the statute entitled "An Act to au- [357] thorize the formation of corporations to provide the members thereof with homesteads, or lots of land suitable for homesteads," approved May 20th, 1861, (Hitt. Dig. sec. 1072,) the forms and limitations are declared under which the inhabitants of this State may incorporate for certain purposes. It declares that not less than seven persons may associate themselves into an incorporated company, for the purposes of a homestead association, but for no longer period than five years. (Hit. Dig., sec. 1073.) The certificate of incorporation offered by the defendants, having but five corporators and being for a term of fifty years, is not sufficient under the said law of May 20th, 1861. The certificate is therefore void on its face. The patent attempts to convey lands not authorized by the act; and that attempt appears on its face. While the act is wholly silent as to the character of the title by which the State holds the lands intended to be granted, it *describes* lands held by virtue of its sovereignty, land below high water mark, along the front of the lands of the association, to six feet depth of water. The southern boundary is the front of the lands of the association; the northern boundary is the line of six feet

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depth of water. The State in issuing their patent (which refers to and is on its face predicated on the act) evidently understood the act as referring to the lands held by virtue of its sovereignty, for it says: "which act authorizes the disposal of the overflowed and tide lands belonging to the State, by virtue of its sovereignty;" that is the interpretation of the officers intrusted to make the patent. No lands belong to the State by virtue of its sovereignty, except "the shore of the sea, and of its bays and inlets, in the common law definition of the word 'shore;' that is, the land usually overflowed by the neap or ordinary tides." (People ex rel. Pierce *v.* Morrill, 26 Cal. 336.)

Having thus defined the land which the officers understood the act to authorize them to grant, the patent goes on to say, "that it appears by the certificate of the Register of the State Land Office, No. 15, that he has been duly noti-
[358] fied, etc., that *the association has paid four hundred and forty-six dollars and twenty-five cents to the State, in full payment for one hundred and forty-eight and three quarters acres of salt marsh and tide lands, described as follows," etc., and these are granted. Here, then, we have under this act a patent issued for, in part, marsh lands. If water front (lands below high water) lands held by the State, by virtue of its sovereignty, are alone authorized to be granted, there is no authority to grant "marsh lands." Unless a patent is *issued without authority*, or is *prohibited by statute*, or is void upon its face, its operation cannot be questioned in any collateral suit. This patent is to marsh lands, is issued without authority, and its issuing is prohibited by statute. (Boggs *v.* Merced M. Co., 14 Cal. 356; Yount *v.* Howell, 14 Cal. 469.) "The principle has been frequently admitted that the fraud must appear on the face of the patent to render it void in a Court of law." Here we contend that the grant of marsh land was not authorized—was prohibited—and that the grant of marsh land made under these circumstances is a fraud on the State (if the State owned the lands) on the face of the patent.

Barstow & Tompkins, for Respondents.

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The question arises here whether the appellant, not pretending to have any title to the land, and only claiming therein a loose sort of possession of two or three years' duration, can be allowed to attack a patent issued over the great seal of the State, upon the grounds attempted in this case. In other words, whether as to him, a mere naked trespasser on lands belonging to another, a patent of the State for the same lands is not conclusive.

The Supreme Court of the United States, in the case of Cooper *v.* Roberts, 18 How. 182, upon the question of the presumed regularity of official acts, says: "The defendant further objects, that the officers of the State violated the statutes of Michigan in selling these lands after they were known or might have been known to contain minerals. We are of the opinion that the defendant is not in a position to raise the *question on this issue. The officers of the [359] State of Michigan, embracing the chief magistrate of the State, and who have the charge and superintendence of this property, certify this sale to have been made pursuant to law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim in privity with Michigan, but holds an adverse right, and is a trespasser upon the land to which her title is attached. Michigan has not complained of the sale, and retains, so far as the case shows, the price paid for it. Under these circumstances, we must regard the patent as conclusive of the fact of a valid and regular sale on this issue."

This Court, in Terry *v.* Megerle, 24 Cal. 624, adopts substantially the views of Mr. Justice Field, in Doll *v.* Meador, 16 Cal. 325, holding that there are two grounds upon which a patent may be impeached collaterally in an action of ejectment: First, By showing that the land did not belong to the State, or is not included in the act authorizing the grant; and Second, By showing that it is excepted by law from the lands authorized to be granted; in other words, as it is usually stated, that the State had no title, or that the law under which the grant was made gave no authority to the officers to make it.

The Court also adopts the rule laid down in that case as to

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the *status* of the party who is permitted upon those grounds to impeach a patent: "He must first bring himself in some privity with the common source of title." So in People *v.* Stratton, 25 Cal. 251: "The party who may be permitted thus to impeach a patent issued by the State, must himself possess a *status* authorizing him to do so. He must show that he has title to the premises, or such an interest therein, in subordination to the title, wherever it may reside, as will authorize him to call the true title to his aid." (Robinson *v.* Forrest, 29 Cal. 320.)

Upon this line of reasoning, we arrive at the same result reached by the cases cited, that mere possession does not give the right to impeach a patent upon the grounds under consideration. Upon the other ground, that the patent is [360] void *upon its face, the law is settled that it may be attacked at all times and in all places, and by every person against whose possession it is aimed. We do not disagree with appellant's counsel upon the law of their argument upon this point, but we deny the fact. An instrument may be fair upon its face, but void in fact. A deed executed under power of attorney may be formal and legal in all its parts, and yet void for want of authority on the part of the attorney to execute it. But it would not be void *on its face:* it would be valid on its face. The term *void on its face,* so often made use of in the cases, signifies a defect in the form, structure, or execution of a patent, which is apparent from an inspection of the instrument. It may be void in fact as to a portion of the land attempted to be conveyed, because not authorized by law, but the defect can only appear by an examination of the law giving the power, and not upon the face of the patent—in which case it could not be said to be void on its face. "The principle has been frequently admitted that the fraud must appear on the face of the patent to render it void in a Court of law, and that when the fraud or other defect arises, *dehors* the grant, the grant is voidable only by suit." (14 Cal. 366; Winter *v.* Jones, 10 Ga. 190; Jennings *v.* Whittaker, 4 Mon. 50.)

By the Court, SHAFTER, J.:

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Action to recover damages for breaking and entering the plaintiff's close. The defendants denied all the allegations of the complaint, and further defended on the ground that the *locus in quo* was the property of the North San Francisco Homestead and Railroad Association, a corporation formed under the laws of California, and that they, the defendants, performed the acts complained of as the agents and servants of said company. The appeal is by the plaintiff, and is taken from the judgment and order denying a new trial.

First—For the purpose of proving the corporate existence of the company, the defendants offered in evidence an *instrument purporting to be a certificate of incorporation of the North San Francisco Homestead and Railroad Association, signed and sealed by five persons only. The incorporation purported to be for twenty-five years. The plaintiff objected to the admissibility of the document, on the ground that five persons could not, by law, incorporate for homestead purposes, nor for a longer time than five years. The objection was overruled, and the plaintiff excepted. [361]

There was no error in the ruling available to the plaintiff. The opening testimony of the plaintiff tended to prove that the company was a corporation *de facto*, and that evidence not only dispensed with the necessity of strict proof of the corporate character, but precluded the plaintiff from inquiring into or disputing it. Such inquiry could be had only at the suit of the State or on information by the Attorney-General. (Hitt., Art. 751.)

Second—To prove title in the corporation to the *locus in quo*, the defendants gave in evidence a special act of the Legislature, entitled "An Act to authorize the sale and conveyance to the North San Francisco Homestead and Railroad Association of certain overflowed lands in the city and county of San Francisco," approved April 4, 1864, (Laws 1864, p. 482,) and then offered in evidence a patent of the State of California, dated June 23, 1864, purporting to be based upon the act. Objection was taken by the plaintiff, on the ground that the patent "was void on its face and professed to grant lands not authorized by the act." The patent was received and read to the jury, under the plaintiff's objection, and

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"subject to all objections as to its effect." At a later stage in the trial the counsel of the plaintiff moved that the patent be stricken from the evidence, on the ground, "First—That it does not commence where the act of April 4, 1864, authorized it to commence; Second—That it embraced on its face lands not authorized to be granted by the statute; Third—That it not only takes land above the ordinary high
[362] water mark, but *extends out beyond six feet deep at low water." The motion was denied, and the plaintiff excepted.

It is settled by the decisions in this State, that if a patent be void upon its face it may be assailed at any time and in all cases; for it is itself in such case record evidence of the matters which render it a nullity. And it is also settled, if a patent show upon its face that it was issued in the absence of legislation directing a disposition of the property described, that a case will be made out within the principle. Such patent may therefore be collaterally attacked in any action by any party interested to dispute its validity. (Doll *v.* Meador, 16 Cal. 297; Terry *v.* Megerle, 24 Cal. 624; People *v.* Stratton, 25 Cal. 251.) The learned counsel for the respondents dispute neither the correctness nor the conclusiveness of these judgments. The only point made by them in answer to the objection is, that the sale was not in any degree *ultra vires* on the face of the patent. We consider however that the second ground assigned by the plaintiff in support of his general objection to the admissibility of the patent in question to have been well taken as to the marsh lands included therein.

The only legislative warrant for the sale of State lands to the defendant is found in the special act of 1864, upon which the patent purports to be based. The lands to be sold and conveyed to the company are described in the title of the act as "certain overflowed lands in the city and county of San Francisco." This description is vague and imperfect, but it is rendered sufficiently precise by a further description contained in the body of the act. The lands are there described as lands "belonging to the State in front of lands of said association in the northerly portion of the city and county of San Francisco, west of Buchanan street." So far, the

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description throws no light upon the quality of the land to be sold and conveyed, nor upon the nature or origin of the State's title to it. But the description proceeds: "Commencing at the northerly boundary of the lands of said association at high water mark on said Buchanan street, and extending to a distance north where the water is not *exceeding six feet deep at low water along the entire [363] front of the land of said association upon said northerly boundary thereof, and extending westerly to said reservation; provided, that in no case shall it extend to a depth of water exceeding six feet at the lowest stage of the tide, nor interfere with the water front of the adjoining property." It is claimed by the counsel of the plaintiff that this description is applicable, and applicable only to lands owned by the State by reason of its sovereignty; that is to say, lands below ordinary high water. (People *v.* Morrill, 26 Cal. 336.) And such we consider to be the clear result of the description on its face. The point of beginning is at "*high water mark* in the northerly boundary of lands belonging to the association." High water mark, in the absence of all statements to the contrary, must be intended to mean "ordinary high water mark;" the point at which the sovereign ownership of the State begins. The line extends thence to the north—not landward, but seaward—to a point "where the water is not exceeding six feet deep at *low water*." From that point the line turns west and runs under the water at the depth of six feet at the lowest stage of the tide along the entire "front" of the lands, in the northerly boundary of which, one point, at least, is touched by ordinary high water. And we consider that it must be understood, from the description, that that boundary coincides with the line of ordinary high water throughout its entire length. The term "front," applied to that line, indicates such general coincidence; and so does the fact already named, that one point in the line is expressly put at high water; but the provision that the line drawn to the west under water, not exceeding six feet in depth, shall not "interfere with the water front of the adjoining property," demonstrates it. The adjoining property here alluded to must be the "land of the association" previously named, and along or over

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against whose entire "front" the water boundary of the patented lands is drawn. It must be understood that the front first alluded to is identical with the front last alluded to and distinguished as "water" front—that is, the line, [364] *prima facie*, of ordinary high water. The *result is, that the land embraced in the offer to sell, is, according to the statute description of it, all under water at ordinary high tide, and belonged to the State by reason of its sovereignty.

Now, as to the patent: there are two descriptions given in it of the lands which it purports to convey. The first is by naming them "State salt marsh and tide lands;" the second is by courses and distances—the last giving no clue to the character of the land.

"Salt marsh" was first used to designate a class of lands belonging to the State in an act passed May 13, 1861, (Stat. 1861, p. 361, sec. 27,) and we understand the term as applying to a certain class of "swamp and overflowed lands" held by the State under the "Arkansas Act" of September 28, 1850. (26 Cal. 352.) The descriptive phrase "tide lands" also occurs for the first time in the legislation of this State, in the act of May 13, 1861; and it is applied to lands covered and uncovered by the ordinary tides. (People *v.* Davidson, 30 Cal. 379.) As there is no third class of lands belonging to the State in which the characteristics of marsh and tide lands are blended, we interpret the patent as calling for marsh lands in part and for tide lands as to the residue. The latter is the efficient call of the patent, the former being null and void for the reasons already stated. The patent being good in part and bad in part, and there being no intendment that the *locus in quo* was on that part of the general area described by courses and distances which is made up of tide lands, the burden was upon the defendants of proving that such was the fact—that is to say, the burden was upon them of showing themselves within the only efficient call of the instrument under which they justified. Evidence was introduced by the defendants tending to prove that the fences torn down by them were on land below the line of ordinary high water, while the testimony of the plaintiff tended to prove that they

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were above that level, and were either marsh or upland; one of which only was within the terms of the patent, and neither of which was within the offer to sell. On this state of the *evidence the Court told the jury, amongst other [365] things, that "if they found on the evidence that the land on which the alleged trespass took place, where the fences stood, was above ordinary high water mark, but subject to periodical overflow of spring tide seas, they could not consider the injury to the plaintiff as against their holding under the patent." This instruction was, in our judgment, erroneous. The jury were told, in effect, that the defendants would be entitled to recover, if the *locus in quo* was not in fact within the only operative call of the patent under which they justified.

The case at bar is not like that of Carder *v.* Baxter, 28 Cal. 99, cited for the respondents. The patent in that case was for swamp and overflowed lands, and it was held that the defendant being a stranger to the paramount source of title, could not dispute that the lands were in fact what they were represented to be in the patent. According to the patent in the case at bar, the *locus in quo* was either marsh lands or tide lands, but the patent did not determine which. The defendant undertook to show which it was by evidence introduced for that purpose, and the plaintiff coöperated in clearing up the question by evidence on his part.

Judgment reversed, and new trial granted.

JOHN B. WARD *v.* THOMAS W. MULFORD et als.

RIGHT TO LAND ACQUIRED FROM MEXICO OR SPAIN.—The transfer of the sovereignty of California from Mexico to the United States did not affect the right of the inhabitants to their land which they had acquired from Mexico or Spain before such transfer.

TITLES ACQUIRED FROM MEXICO IN CALIFORNIA.—The United States, after the acquisition of California from Mexico, was bound to respect, not only perfect titles acquired by the inhabitants under Mexican domination, but also to respect such equitable claims as had their origin in the action of the Mexican Government, but were inchoate at the date of the succession, and to take such steps as were necessary to perfect the same.

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JUDGMENTS AFFIRMING VALIDITY OF MEXICAN GRANTS. — The judgment of the Board of Commissioners appointed by the United States to inquire into the validity of titles acquired from Mexico, or of the Courts of the United States on
[366] appeal, *affirming a title derived from Mexico, when final, is conclusive upon the Government and upon all persons claiming under the Government by title subsequent.

RIGHT OF CALIFORNIA TO LAND WITHIN ITS BORDERS. — The State of California came into the Union, with her claim to the lands within her borders, such as she took by virtue of her admission under general grants to all the States previously made by the Federal Government, and such as might thereafter be granted from the same source, and such as she then acquired by virtue of her sovereignty, subordinate to the prior equities of grantees under the former sovereign, and bound by the action of the Federal Government in ascertaining and settling such equities.

[1] MEXICAN GRANT OF LAND OVERFLOWED BY TIDES. — If the United States has confirmed the title to land in this State acquired from Mexico during Mexican rule, and which the State would otherwise have owned by virtue of its sovereignty, the State has no power to dispose of the same.

LAND HELD BY STATE BY SOVEREIGNTY. — The land which the State owns by virtue of its sovereignty is such as is covered and uncovered by the ebb and flow of the neap or ordinary tides.

SALE OF LAND HELD BY STATE BY ITS SOVEREIGNITY. — The State can make no disposition of the lands it holds by virtue of its sovereignty prejudicial to the rights of the public to use them for navigation and fishery, but it may dispose of such lands for the purpose of promoting the interests of navigation or of reclaiming them from the sea, where it can be done without prejudice to the public right of navigation.

APPEAL from the District Court, Third Judicial District, Alameda county.

The defendants appealed.

The other facts are stated in the opinion of the Court.

E. W. F. Sloan, for Appellant.

The land in controversy is included by the official survey as part of the San Leandro Rancho; and if the views advanced in Teschemacher *v.* Thompson are in all respects to be maintained, the judgment herein rendered by the Court below should be affirmed. It is obvious, however, that one great cardinal principle of law was overlooked in the decision of that case, which decision, in one important particular at least, is in direct conflict with those made by the Supreme Court of the United States, in Pollard's Lessee *v.* Hagan, 3 How. 212;

[1] Distinguished, More v. Massini, 37 Cal. 435.

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Goodtitle v. Kibbe, 9 How. 471; and Seabury v. Field, 19 How. 333.

The record in this case shows, that by the express language of the original grant the San Leandro Rancho is bounded on *the west by the sea; that is to say, by [367] the line of high tide. It is therefore undeniably certain that the land in question lies without the exterior boundaries of said rancho, and was consequently not granted by the Mexican Government. All that has been said and all that can be said on behalf of the respondent is, that it has been included by the survey and has *thereby* become part of the rancho. The claim has been confirmed and surveyed, and a patent has been issued releasing all the right of the United States to the land within the survey. It is therefore conceded that the final decree of confirmation was, upon acknowledged principles of law, binding upon the United States. It is also conceded that, as against the United States, the patent vested in the confirmees a good legal title to the entire tract of land therein described. But it is perfectly clear that, as against any one else, whose claim of right accrued prior to the 3d of March, 1851, the decree is not conclusive. It is a most obvious principle of natural justice and of law, that no one shall be bound by proceedings to which he is not a party. (1 Greenl. Ev. sec. 522.) "Under the term parties, in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defence or to control the proceedings, and to appeal from the judgment. The right involves also the right to adduce testimony and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause." (Id., sec. 523; Vose v. Morton, 4 Cush. 31; Pond v. Makepeace, 2 Met. 114; Leonard v. Bryant, 11 Id. 370; Carter v. Bennett, 4 Fla. 352; Watson v. Spence, 20 Wend. 262.) But in proceedings before the Board of Land Commissioners and before the District and Supreme Courts, neither the State of California nor any one claiming under it had the right to intervene. That privilege was not given by the act of Congress of March 3, 1851, nor by any subsequent act. It is therefore evident that the State of California is not concluded

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by the decree of the District Court confirming the survey. So far as the right of the State is concerned the whole [368] *proceeding was *coram non judice*. It is admitted that if any particular parcel of tide land had been previously granted to some private individual by competent authority it would form no part of the domain of the State. But whether such grant were in fact ever made is a question to be judicially tried and determined; and in the trial and decision of it the State or her patentee is entitled to be heard.

W. W. Crane, Jr., for Respondent.

The case of Teschemacher *v.* Thompson, 18 Cal. 11, is precisely parallel with the case at bar. I in part prepared a brief upon the questions involved, but finding that all the reasoning fell naturally into the same lines as in that case, and being unable to add anything to the able argument of Judge Field, I will re-submit that case as embodying all that can be said by respondent, and will only in addition refer to the cases subsequently decided by this Court upon the proposition as to who constitute "third persons" within the meaning of the fifteenth section of the act of Congress of 1851, to ascertain and settle private land claims in the State of California. (Leese *v.* Clark, 20 Cal. 425; Minturn *v.* Brower, 24 Cal. 644; De Arguello *v.* Greer, 26 Cal. 626.)

By the Court, SANDERSON, J.:

Ejectment to recover a parcel of land, part of the Rancho San Leandro, situated in Alameda county. It was tried without a jury, and comes here upon the pleadings and a special finding of facts, unaccompanied by any evidence, except a map or diagram showing the lines of the Rancho San Leandro as surveyed by the Surveyor-General of the United States and confirmed by the District Court of the United States for the Northern District of California, the lines of a patent from the State of California, under which the defendants in part claim, the lines of the tract in dispute, the line of State segregation of swamp and overflowed lands, at that point, [369] and the lines of *the spring and ordinary high tides of

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the Bay of San Francisco, by which the land is bounded on the west.

Upon the facts as found, the Court gave the plaintiff judgment for seventeen eighteenths undivided. The defendants claim that the judgment should have been for them as to a part of the demanded premises, if not as to the whole.

The case is as follows: In 1842 the Rancho of San Leandro was granted in colonization by Juan B. Alvarado, then Governor of Upper California, to José Joaquin Estudillo. Said grant was presented to the Board of Commissioners appointed under the act of Congress passed March 3d, 1851, and was confirmed by said Board on the 9th of January, 1855. Said grant was also confirmed by a decree of the District Court of the United States on appeal, which decree afterwards became final. In the decree of the Board, and also of the Court, the ranch was described as bounded on the west by the bay. ("*Mare.*") A survey was afterwards made by the Surveyor-General of the United States for the State of California and confirmed by the District Court of the United States. The land in suit fronts on the Bay of San Francisco and is within the lines of this survey. The plaintiffs hold the Estudillo title to seventeen eighteenths undivided.

The defendants entered upon the land in 1852. At that time, (and still,) at and near the place where the land is situated there was a salt water pond, covering several hundred acres, including a part of the land in suit, into which the tide waters of the bay flowed at flood tide and returned at ebb tide, through a slough about two feet wide and fifteen or twenty rods long. On the west side of the slough there was a ridge of sand extending from the slough along the shore of the bay in a northerly direction and connecting with a road at the main land. At the slough this ridge rose into a knoll, or mound, three or four feet higher than the surrounding ground, which, inside of the ridge, was marsh. From the knoll to the main land the ridge was broken at places and crossed by small sloughs or gullies, caused by the action of the tides, but *it was the path or way by which the natives [370] of the country, on horseback and in wagons, passed from the main land to the knoll, and thence across the slough,

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by which the salt water pond was fed, into the country beyond. This knoll was used by the defendants as a shipping point for freight to and from San Francisco. To improve it for that purpose, they widened the slough, constructed a wharf, and raised the knoll by covering it with sand, gravel, and shells to the depth of several feet. They also drove piles between the knoll and the bay to protect the former from the action of the tides, and on it built a warehouse in 1856. They also filled up the gullies in the ridge between the knoll and main land, and have since maintained a road over the same suitable for hauling freight to and from their warehouse.

A part of the land in suit is covered and uncovered by the flow and ebb through the slough of the neap or ordinary tides, which occur twice every twenty-four hours. A still larger part is covered and uncovered by the flow and ebb of the spring tides, which occur at or about the new and full moon. The remainder, including the knoll and ridge, is not reached by the tides, but is all within the segregation of swamp and overflowed land made at that point by the State.

The defendants obtained a patent from the State on the 4th of May, 1857, which covers the land in controversy, and purports to convey it as swamp and overflowed land.

After this action was brought, they also acquired a one thirty-sixth undivided interest in the San Leandro grant.

In view of the foregoing facts, the Court below held that the defendants took nothing by their patent as against the plaintiff's title. Hence this appeal.

From the foregoing statement, it is clear that there are no circumstances connected with this case which distinguish it from the case of Teschemacher *v.* Thompson, 18 Cal. 11. The land in suit in that case was in all respects of the same character as that involved in this, and the titles of the parties in both cases are of the same character and come from the same source respectively. It was there held in substance
[371] that the *transfer of the sovereignty over the country from the Mexican Government to the United States did not affect the rights of the inhabitants to their property, but, on the contrary, that such rights, both by the law of nations and by the stipulations of the treaty of Guadalupe

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Hidalgo, remained the same after the transfer of the sovereignty as before, and were to the same extent entitled to the protection of the new sovereign as of the former. That, under the obligations imposed by the law of nations and the stipulations of the treaty, the United States was bound not only to recognize and respect perfect titles acquired by the inhabitants of the country under Mexican domination, but also to recognize and respect such equitable claims as had their origin in the action of the Mexican Government, but were inchoate and imperfect at the date of the succession, and to take such steps as might be necessary in order to perfect the same as fully as they would or could have been had the sovereignty of the country remained unchanged. That the obligation thus cast upon the Federal Government had been performed through the operation of the act of Congress of the 3d of March, 1851, and subsequent legislation creating a Board of Commissioners and vesting them with power to inquire, in the appointed mode, into the validity of such claims and to admit or deny the same, and in the former event that the proceedings so had became the record of the action of the Government in the premises, and as such conclusive upon the Government and upon all persons claiming under the Government by title subsequent. This has become the settled law of this State and of the United States as recently determined by the Supreme Court of the United States in the case of Beard *v.* Federy, decided at the December term, 1865. (3 Wallace, 478.)

From the foregoing, it results that the State of California came into the Union with her claim to the lands within her borders, such as she took by virtue of her admission under general grants to all the States previously made by the Federal Government, and such as might thereafter be granted from the same source, and such as she then acquired by virtue of *her sovereignty, subordinate to the prior [372] equities of grantees under the former sovereign, and bound by such action as the Federal Government might take in ascertaining and settling such equities. In private proprietorship and in sovereign right, the United States succeeded the Mexican Government, and in both these respects

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California, so far as she acquired any right in either, succeeded the United States, and became privy to the latter in estate in respect to all lands within her borders, whether such as may be held in private or sovereign right. In this respect, no distinction can be made between the lands acquired by her through Federal grants and such as she took by virtue of her sovereignty. In respect to the latter, as in respect to the former, the United States succeeded to the title, and took it upon precisely the same terms upon which the Mexican Government held it at the date of the cession. And so of the State. If the Mexican Government had made any rightful disposition of lands which she held as sovereign, neither the United States nor the State, as succeeding sovereigns, could disregard it any more than in the case of other lands. But by this we do not desire to be understood as holding that the Mexican Government, or this State, has the same power of absolute alienation over lands held in virtue of their sovereignty which they have over other lands. The land which the State holds by virtue of her sovereignty, as is well understood, is such as is covered and uncovered by the flow and ebb of the neap or ordinary tides. Such land is held by the State in trust and for the benefit of the people. The right of the State is subservient to the public rights of navigation and fishery, and theoretically, at least, the State can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned. But this restriction does not prevent her from disposing of them so as to advance and promote the interests of navigation.

On the contrary, such a disposition of them would be
[373] in *keeping with the purposes of the trust in which she holds them. Nor of reclaiming them from the sea, where it can be done without prejudice to the public right of navigation, and applying them to other purposes and uses. There are large tracts of salt marsh lands, of which the land in suit is an example, which are covered and uncovered by the flow and ebb of the neap tides, and therefore belong to

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the State by virtue of her sovereignty, which are of no possible use for the purposes of navigation, but may be valuable for agricultural or other purposes if reclaimed from the tides. Such lands the State may undoubtedly grant in private ownership for the purposes of reclamation and use, for by such a course no right of the public to their use for the purposes of navigation would be prejudiced. On the contrary, the right of navigation, in many cases, might be subserved by such reclamation.

We find no error in the record, and the judgment must be affirmed.

Ordered accordingly.

A. STEVENSON AND JAMES L. STEVENSON *v.* GEO. STEINBERG AND L. MAYER.

UNDERTAKING ON APPEAL.—When, on account of the insufficiency of the undertaking on appeal, the appellant files a new undertaking in the Supreme Court, approved by one of the Justices, the respondent cannot require the sureties in the substituted undertaking to justify.

IDEM.—The Justice approving such new undertaking, when called upon to approve the same, will ascertain by examination of the sureties that they possess the necessary qualifications.

APPEAL from the District Court, Fifth Judicial District, Tuolumne county.

Plaintiffs recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellants.

H. P. Barber, for Respondents.

*By the Court, CURREY, C. J.: [374]

At the last January term of this Court, the respondent made a motion to dismiss the appeal in this case, on the ground that the undertaking executed in the first instance

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was not sufficient under the three hundred and forty-eighth section of the Pr. Act. Upon inspection of the transcript of the record, it was ascertained that the undertaking did not conform to the requirement of the statute; but the appellant having anticipated the objection specified, caused to be filed on the day preceding that on which the motion was made an undertaking good and sufficient in form, which one of the Justices of this Court approved on the day on which the motion to dismiss was made; and this appearing to the Court, the motion was denied, and thereupon the cause was submitted on briefs to be filed. (Stat. 1861, p. 589, sec. 3.)

On the 8th of February last, the respondent served upon the appellant's attorney a notice excepting to the sufficiency of the sureties who executed the undertaking filed the day preceding the making of the motion to dismiss. After this, on the 25th of February, the appellant's attorney notified the respondent's attorney that the sureties would justify before the County Judge of Tuolumne county, (that being the county in which the action was tried,) at Chinese Camp, in said county, on the 27th of the same month, at an hour named. The sureties did not appear and justify at that time or any other, nor has any other undertaking been given.

At the present term of the Court the respondent has moved, upon an affidavit showing the above facts, for a dismissal of the appeal, which the appellant opposes on the ground that the approval of the substituted undertaking by a Justice of this Court placed it beyond the reach of exception. The third section of the act of 1861, entitled "An Act to regulate appeals in this State," (Stat. 1861, p. 589,) provides that "no appeal shall be dismissed for insufficiency of the notice of appeal or undertaking thereon; provided, that a good and sufficient undertaking, approved by a Judge of the [375] Supreme *Court, before the hearing upon motion to dismiss the appeal, and upon payment of such reasonable costs as the Court may adjudge." We are of the opinion the approval of the undertaking substituted for the one held insufficient amounted in fact not only to a determination that the undertaking was such in form and substance as the statute required, but also of its sufficiency as to the sureties. It

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may be proper to remark, in this connection, that at the time this undertaking was approved by one of the Justices of the Court, we were of the impression that such approval only extended to the form of the undertaking and its sufficiency in the amount required to render the appeal effectual; but upon a more careful examination of the statute, we are satisfied the effect of such approval was also a determination that the sureties were good and sufficient. The act of 1861 does not provide that the appellant may except to the sufficiency of the sureties to an undertaking substituted as therein specified in the mode mentioned in the three hundred and fifty-fifth section of the Practice Act, nor in any other manner; hence, the exception to the sufficiency of the sureties to such undertaking must be held to have been entirely ineffectual. We may further add that we recognize it to be the duty of a Judge of this Court, when called upon to approve an undertaking proposed to be given in substitution of one executed in the first instance, which, from some cause, is or becomes insufficient, to ascertain, by examination of the sureties, that they possess the qualifications required by the section last referred to, as well as that the undertaking is in the form and amount prescribed by the statute. From what we have said on the subject considered, it results that the motion to dismiss the appeal must be denied, and it is so ordered.

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*MARIE DE VIGNES DE RACOUILLAT, ETIENE L. RACOUILLAT, ELIZABETH VIGNES, AND JEANNE VIGNES SIGNE *v* PIERRE SANSEVAIN, JEAN LOUIS SANSEVAIN, JOHN E. RENE, JEAN VIGNES, AND MANUEL REQUENA, EXECUTOR OF THE ESTATE OF J. L. VIGNES, DECEASED. [376]

RATIFICATION OF ACT OF ATTORNEY IN FACT.—If the Court finds as a fact that one person executed a written instrument for another as his attorney in fact, without any power to do so, but that the constituent afterwards expressly ratified the act, the presumption will be that the ratification was in some legal and sufficient mode.

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[1] CONTRACT OF MARRIED WOMAN.—If a married woman acquired property by inheritance in California before its transfer to the United States, her power to contract concerning it is not governed by the act of April 17th, 1850, "defining the rights and duties of husband and wife."

SEPARATE PROPERTY OF WIFE.—Property acquired by descent by a married woman in California before its cession to the United States, became her separate property under the Mexican law.

POWER OF ATTORNEY OF MARRIED WOMAN.—A married woman may make a valid executory contract, by her attorney in fact, affecting her separate estate acquired by her in California before its cession to the United States, and her husband may be such attorney in fact.

SALE OF CHILDREN'S INTEREST IN THE COMMON PROPERTY TO THEIR FATHER.—If children, upon the death of their mother, inherit one half the common property, a sale by them of this interest to the father, even by an instrument which creates a right in his favor against them which he can only enforce in equity, is a sufficient consideration to support a promise by him to pay them for the same.

RIGHT OF ALIEN TO HOLD PROPERTY.—The question of the right of a non-resident alien to hold property, at common law and under the civil law, was a matter between the alien and the Government, and could not be called in question in a collateral action between individuals.

AGREEMENT BETWEEN CHILDREN AND FATHER.—A claim set up by children to a part of the common property upon the death of their mother, who was a non-resident alien, is a sufficient consideration to render valid an agreement of compromise with their father, by which they convey to him and he promises to pay them a consideration therefor.

[2] CONSTRUCTION OF CONTRACT.—The object to be attained in the construction of a contract is to ascertain from its language, if possible, the intention of the parties.

RECORDING INSTRUMENTS NOT SEALED.—Mortgages and conveyances which are not under seal, are not entitled to be recorded.

NOTICE IMPARTED BY RECORDING DEEDS.—The record of mortgages and conveyances which are not under seal, does not impart notice to subsequent purchasers or incumbrancers.

[3] EXECUTORY CONTRACT FOR MORTGAGE.—An agreement in writing, which by its terms makes a sum of money due from one to the other chargeable as a lien upon land, but which is neither under seal, nor so executed or acknowledged as to make it a mortgage within the act concerning conveyances, will be regarded as
[377] *an executory agreement for a mortgage, and enforced in equity as a specific lien upon the land, as against the person executing and strangers having actual notice.

AGREEMENT CREATING INCUMBRANCE ON LAND.—An agreement not so executed or sealed as to make it a mortgage, signed by both parties, which provides that the purchase money of land shall be secured by the property if not sold, or by the purchase money if sold, is an incumbrance on the land as against the party executing and strangers with actual knowledge, which may be removed by a sale and substituted security on the purchase money.

[3] COVENANT IN A MORTGAGE.—If the mortgagor covenants in the mortgage that he will pay and discharge, whenever the same becomes due, all legal mortgages and

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[1] Affirmed, Racouillat v. Requena, 36 Cal. 655, 657. Cited, Love v. Watkins, 40 Cal. 562.
[2] Cited, Sprague v. Edwards, 48 Cal. 249.
[3] Cited, Love v. S. N. L. W. & M. Co., post 653; Lamb v. Davenport, 1 Saw. 631.

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incumbrances, of whatever nature and description, upon the mortgaged property, of a previous date, the covenant will make the mortgagor personally liable for a sum due and secured by an executory contract for a mortgage not under seal or recorded, if the mortgagor had actual notice of it, and the mortgage will become security for the performance of this covenant.

[1] JUDGMENT AGAINST EXECUTOR.—A judgment against an executor for a demand against the testator, should direct that the same be paid in due course of administration.

APPEAL from the District Court, First Judicial District, Los Angeles county.

The Court below rendered judgment against the defendants Pierre and Jean Louis Sansevain, and Requena, the executor, but gave judgment in favor of defendant Rene. The defendants against whom judgment was rendered appealed.

The other facts are stated in the opinion of the Court.

Baldwin & Felton, for Appellants.

The plaintiffs cannot sue upon the clause in the mortgage executed by Pierre Sansevain and his wife, Paula S. Sansevain, to Jean Vignes, because they are not mentioned in said mortgage, are not parties thereto, and have no legal interest therein. (See 1 Chitty on Pl., pp. 4, 5.) The claims set up in the complaint have never been allowed by the executor. He has refused to allow them, and the remedy of plaintiffs was to bring suit against him within three months from the date of rejection.

Felton & Hittell, also for Appellants.

*Whatever may have been the rights and equities as [378] between Jean Louis Vignes and his children, it seems to us that the plain, unquestionable meaning conveyed to any person who might become a purchaser, was that it would be perfectly safe for him to buy from Jean Louis Vignes as "the sole and only proprietor," and that payment to him would be an entire discharge of any and all claims. It was certainly not the intention to merely give the father power to sell in his own name the interests of the children; or in other words,

[1] Cited, Bank of Stockton v. Howland, 42 Cal. 133.

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to create in favor of the children a covenant running with the land, and obliging the purchaser to see to the application of the purchase money; on the contrary, it seems to us that the meaning was, as the words imply, that in case of a sale, Jean Louis Vignes might sell as "sole and only proprietor;" which he could not do if the construction put upon the instrument is correct.

We may admit that the intention of the parties to the instrument of March 13th, 1851, was, if the Aliso should be sold, that the amount coming to the children should be secured upon the purchase money; but we do not admit that the purchaser was bound to see to the security. That was a matter entirely between the father and the children. As long as the Aliso remained in his hands it was to be regarded as between themselves as charged with the children's portions, and if it should be sold that the money received by the father should be charged in the same manner; but that the land itself should be entirely free and unincumbered. This was the way in which Jean Louis Vignes evidently understood it at the time he made the deed to the Sansevains, and the way in which the Sansevains understood it, both when they purchased and when they afterwards paid the purchase money. It was not for a moment intended or understood that the children, or any of them, should have any claim, interest, or equity as against the purchaser. The purchaser was to know no one in his purchase but the father, as the "sole and only proprietor." It was the father and not the purchaser who guaranteed the children's portions, and his guarantee,
[379] far from *being a charge upon the land, was expressly left to be given when and how he thought proper.

V. E. Howard, for Respondents.

If the instrument of 1851 is not good on the part of Mr. Vignes as a mortgage, it will operate as an agreement to make a mortgage, and a Court of equity will reform it and enforce it accordingly, as complaint prays the appropriate relief. (Dalton *v.* Warschauer, 21 Cal. 625; 12 Cal. 575.) There can be no doubt that an agreement for a mortgage is an incumbrance, if not technically a mortgage. (2 Hilliard on

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Real Prop. 397–413.) The property in the hands of Mr. Vignes was a trust to pay the debt to his children, and extended to the proceeds as well as to the property. (2 Hilliard, 397.) The purchaser was bound to look to the application of the purchase money. (2 Story's Eq., sec. 1127.) The instrument of 1851 expressly declares that in case of sale the mortgage shall extend to the proceeds of the sale. The purchase money was therefore as much bound as the property itself. The right to sell was only a privilege granted for the accommodation of the debtor, if indeed it existed without the release of the mortgage. The power to sell is coupled with the duty to secure the debt on the purchase money. (Wormly *v.* Wormly, 8 Wheat. 421.) The debt mentioned being specific in its nature comes within the principle of the cases requiring the purchaser of property thus charged to look to the application of the purchase money.

By the Court, SAWYER, J.:

Jean Louis Vignes, a citizen of France, came to California about the year 1827, and settled at Los Angeles, where he resided till his death, in January, 1862. He left in France a wife and four children, Marie, Elizabeth, Jeanne, and Jean. The wife of Vignes died in France about the year 1843, having never been in this country. Said Vignes, at the time of the death of his wife, owned a tract of land in Los Angeles, *called "Aliso," which he purchased during [380] his residence in that place. Marie, one of the children, is the wife of plaintiff, E. L. Racouillat. Marie and Elizabeth have never been in California. After the death of Madame Vignes, the children insisted that the property thus acquired by said Jean Louis Vignes, including the said "Aliso," was common property under the laws of Mexico, and accordingly set up a claim to one half, as heirs of their mother. On the 13th of March, 1851, while said Vignes was still in possession of the "Aliso," property, for the purpose of settling their claims, an instrument in writing, in the French language, was executed by the father, said Jean Louis Vignes, and two of the children, Jeanne and Jean, and by Racouillat, claiming to act by virtue of a power of attorney on behalf of

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the other two—his wife, Marie, and Elizabeth. The following is a translation of the material portions of said instrument:

"Agreement holding the place and stead of a settlement and liquidation concerning the estate (*l'heritage:* inheritance) of Mrs. Vignes, wife and mother of the parties in interest (*co-interessés*) hereafter (named):

"Article 1. Mr. Vignes regulates (*regle:* adjusts, disposes of, settles) the part of the first quarter as follows:

"Mrs. Racouillat, born Vignes, Marie:

"Miss Elizabeth Vignes, Sister Catharine of the Angels:

"Mrs. Widow Signe, born Vignes, Jeanne;

"Mr. Vignes, John;

"To each one the sum of three thousand dollars, to be paid and received (*a récévoir*) pursuant to the agreement made between the said Mr. Vignes and each one of his children hereinafter named.

"Art. 2. For the second quarter of which Mr. Vignes is usufructuary (*usufruitier*) each one of the heirs shall receive a sum of five thousand five hundred dollars, either after or before his decease, if he thinks it possible (*si'l le juge possible:* as he thinks best—deems possible in his own judgment) and the total sum shall be guaranteed (*sera gerantie sur:* war-
[381] ranted *by, secured by, made good by) the property in the Pueblo, called the 'Aliso,' if he does not sell it, or by the consideration money (*prix d' acquisition:* price of the purchase) if he does sell it.

"Art. 3. The acceptation of these conditions (*l' acceptation de ces conditions:* execution of this instrument or agreement) extinguishes (*eteint:* annuls, renders void) all rights, holds the place and stead of a final settlement (*liquidation:* liquidation) confers on Mr. Vignes all the rights enjoyed by (*devolu:* escheated to, devolving on) a sole and only proprietor, and grants him the right (*permet:* allows him) to act in that capacity, either in the presence or absence (*soit en-soit:* as well as) of the said heirs or representatives, subject, howevrr, to his complying with (*se conformant à*) the guaranty (*garantie:* security) stipulated for the sum allowed (*accordée:* accorded, admitted, conceded.)"

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This instrument was acknowledged, though perhaps not in due form, deposited with the Recorder of Los Angeles county for record, and by him copied into "Book B" of deeds and mortgages. At the time of the execution of the said instrument, Racouillat had an instrument in writing, duly executed and acknowledged by his wife, Marie, and purporting to be a power of attorney. No power of attorney from Elizabeth was proved, but the Court finds that "the ratification of the said acts of her attorney has been established by the express ratification of the said Elizabeth, and by a reception from J. L. Vignes of a portion of the consideration money, through her agent, Madame Signe."

On the 3d day of April, 1855, said Jean Louis Vignes executed and delivered to the defendants, Pierre and Jean Louis Sansevain, a conveyance of the said "Aliso" property, with covenant of warranty of title, and "that the said premises were free and clear of all incumbrances of what nature or kind soever, for the consideration of forty thousand dollars, which was receipted by the said Vignes, and consisted in part of the sums secured by the mortgage next hereinafter *mentioned." To secure the payment of a part of the [382] purchase money, the said Sansevains executed and delivered to said Vignes a mortgage, bearing the same date as the deed of conveyance, which contained the conditions and covenants hereinafter fully cited in the course of this opinion. Said deed and mortgage were duly acknowledged, and soon after recorded. At the date of said deed and mortgage, both of said defendants, Sansevain, had actual notice of such instrument executed by Vignes and his said children. At the said time there was also a mortgage of record for three thousand dollars, executed by said Jean Louis Vignes in favor of Tobi & Schlessinger, upon said "Aliso" property, which was subsequently paid at maturity by said Sansevains. In the summer and fall of 1855, said Elizabeth, Jeanne Vignes Signe, and said Racouillat, were informed of said sale and mortgage. Afterwards, in 1855, Racouillat received from said Sansevains fifteen hundred dollars, and in the years 1857 and 1858 Madame Jeanne Vigne Signes received two thousand four hundred dollars, partly for herself and partly for her

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father, and in 1858 three thousand dollars more for herself—the last named sum being the sum mentioned in the said instrument of March 13, 1851, as coming to her—with the knowledge on the part of said several parties, that the said several sums were paid on account of said Vignes, out of the annuity reserved to him by said mortgage on the "Aliso" property. Manuel Requena is the executor named in the will of said Jean Louis Vignes.

After the death of Vignes, the father, the said children, Marie, Elizabeth, and Jeanne, severally presented to Requena, executor, as claims against the estate of Vignes, the several sums of five thousand five hundred dollars, mentioned in the second article of said instrument of March 13, 1851, as coming to them respectively—the said sums having never been paid—which claims were rejected. Thereupon the claimants commenced this suit against Requena, executor, the two Sansevains, Rene, and their brother Jean Vignes—the latter having been made defendant because he refused to join as plaintiff.

The first question to be disposed of relates to the [383] execution *of the said agreement of compromise of March 13th, 1851, between Vignes and his children. It is claimed that this was designed by Vignes to be a settlement of the whole matter; that it is not a valid agreement as to one, unless it is binding on all of the ostensible parties; that Racouillat had no authority to act for Madame Racouillat, his wife, or for Elizabeth, whom he professed to represent as attorney; that his act on their behalf is void for want of power, and the agreement not binding upon them; and that, for want of execution on their part, the instrument is void as to all.

The Court found, as we have seen, by the statement of facts already given, "that the ratification of the said acts of her attorney has been established by the express ratification of the said Elizabeth, and by a reception from J. L. Vignes of a portion of the consideration money," etc. There was, then, an "express ratification" by her, as well as a ratification by implication. This is a fact found in the case. The mode or form in which this express ratification was accomplished is not stated; but it must be presumed, in favor of the correct action

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of the Court, nothing to the contrary appearing, that it was in some legal and sufficient mode. If a ratification by a written instrument is required, such ratification, under the findings and judgment, must be presumed to have been shown. This disposes of the objection so far as Elizabeth is concerned.

Marie Vignes (Madame Racouillat) was a *feme covert*, married about the year 1829, still residing in France, and who had never been in California. Her interest, if she had any—her claim as heir to her mother—accrued in 1843, long before the transfer of California to the United States. Her right in the "Aliso" property, whatever it was, accrued under the Mexican law. It was therefore, so far as her power to contract concerning it is involved, not governed by the act of April 17th, 1850, "defining the rights and duties of husband and wife." (Ingoldsby *v.* Juan, 12 Cal. 564; Bodley *v.* Ferguson, 30 Cal. 511.) The latter case has been decided since the re-argument in this case was ordered, and by its aid we shall be able to solve the question now under consideration, *without discussing the many other em- [384] barrassing questions before suggested in the case.

Madame Racouillat, under the Mexican law, was empowered, at least, with the consent and assistance of her husband, to contract with respect to her separate estate, whether real or personal. And her interest in the "Aliso" property, whatever it was, was separate estate. This power continued after the transfer of the sovereignty to the United States, and after the establishment of the State Government and the adoption of a new system of laws, unless there was some limitation put upon the power by the new statutes. The only statutes relating to the subject brought to our notice, are, the act "concerning conveyances," passed April 16th; the act "defining the rights and duties of husband and wife," passed April 17th; the "act adopting the common law," passed April 13th; and the Statute of Frauds, passed April 19th, 1850. The act defining the rights and duties of husband and wife, we have already seen, has no application. In Bodley *v.* Ferguson, we held that the provisions of the act concerning conveyances do not apply to *executory* contracts concerning real

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estate, and that such a contract with respect to the separate estate of the wife, so far as the provisions of that act are concerned, need not be executed by a married woman with the formalities prescribed by the act. We also held that a contract of conveyance, accompanied by a conveyance so defectively executed as not to pass the legal title, and a part performance, might still, in equity, be good as a contract to convey, and might be enforced by a judgment for specific performance. The act adopting the common law as the rule of decision, except so far as it might be repugnant to, or inconsistent with, the Constitution of the United States, or the Constitution of the State of California, conceding it to have any bearing upon the question, is not inconsistent with the power of the wife to make a valid contract with respect to her separate estate in the form adopted. It is well settled in England, and the older States, that unless especially restrained by the instrument under which the separate estate is acquired, a married woman, in equity, could deal with her [385] *separate estate as a *feme sole*—that it being once established that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate, and, as a part of such law, the power of alienation belonged to the wife. (Maclay *v.* Love, 25 Cal. 367; Yale *v.* Dederer, 18 N. Y. 267–70, 277; 22 Id. 452; Jaques *v.* Methodist Episcopal Church, 17 John. 578–9, 585; Tullett *v.* Armstrong, 1 Bev. 21–2, 32; 4 Myl. & C. 393, 405; Baggett *v.* Meeux, 1 Phil. 628.) The interest of Madame Racouillat vested under the Mexican law, and was separate estate. It was protected as such by the treaty of cession, and by Article XI., section fourteen of the Constitution, and, as we have seen, no law affecting her power to make an executory contract concerning it had been passed. The agreement in question, if it had been executed by the wife in person, would, at least, have been valid in equity, as an executory contract for disposing of her interest in the land, and as such would not be within the provisions of the act concerning conveyances, as we held in Bodley *v.* Ferguson, or repugnant to the common law, so far as it was at the time in force in this State, and certainly not within the Statute of Frauds. If the wife could herself,

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in person, make a valid contract affecting her separate estate, we see no reason, independent of any statutory restriction, why she might not do it by attorney, or why the husband might not be the attorney. It was held that a married woman might charge her separate estate "in person, or by her legally authorized agent," in N. Am. Coal Co. *v.* Dyett, 7 Paige, 14; and this ruling was affirmed on writ of error. (20 Wend. 572.) The authorities cited from our own reports to the contrary, by the appellant, are all based upon the statute concerning conveyances, and the act defining the rights and duties of husband and wife, already considered, and are therefore inapplicable.

The Court finds that Racouillat acted under a power of attorney from his wife, "duly acknowledged" and "duly certified." The instrument of March 13th, 1851, was therefore executed, at the time it bears date, by all the parties except *Elizabeth, and the execution on her behalf [386] was adopted by a subsequent "express ratification," and a reception of a portion of the consideration money. The instrument thus executed and adopted created a right in favor of the father as against all the children, which could be enforced, at least in equity, if not at law, and there was a valuable and sufficient consideration for his promise to pay to his children the several sums specified in the agreement to be paid to them respectively, so far, at least, as the terms and execution of the agreement are concerned.

But, it is said, that the mother was a non-resident alien, and could not acquire any estate in common with her husband, under the laws of Mexico; that the children could inherit nothing from the mother in whom there was nothing to inherit; that two, at least, are non-resident aliens, and, on that ground, are incapable of inheriting; that there was nothing valuable to constitute the basis of, or furnish a consideration for, a contract; and that the agreement, therefore, is *nudum pactum*. Under the view we take, it is unnecessary to ascertain the exact *status* of the wife under the Mexican law with reference to this property, or the precise nature of the estate which the children took, if any, as heirs of the mother; or, whether a non-resident alien could inherit. The question

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as to the rights of a non-resident alien to hold property at common law, and, as we understand it, under the civil law, was a matter between the alien and the Government, and could not be called in question in a collateral proceeding between individuals. The proceeding, at common law, to divest an alien of property purchased, is by an inquest of office; and, till office found, an alien may hold real estate. Under the civil law there was some analogous proceeding. (Ramires *v.* Kent, 2 Cal. 560; People *v.* Folsom, 5 Cal. 378; Merle *v.* Mathews, 26 Cal. 477.) There was, in this instance, a claim set up by the children against the father, as heirs of the mother, to one half the property acquired during the marriage under laws recognizing a community of interests, had the wife actually followed the husband to, and resided
[387] with *him, in California. Whether the domicil of the husband was regarded in such a case as the domicil of the wife, by the Mexican law, we need not now inquire. The least that can be said, is, that a well grounded controversy had arisen which might require years of expensive litigation to settle. But the husband seems, from the recitals of the agreement, to have recognized the right, and it is expressly stated that the agreement is to hold "the place and stead of a settlement and liquidation concerning the estate of Mrs. Vignes, wife and mother of the parties in interest." We think the claim made and admitted or contested, as the fact may have been, was sufficient to form the subject-matter of a valid agreement of compromise, and that the agreement actually entered into is not void on the ground claimed.

The next point for consideration is the construction of the agreement; and the great difficulty in this branch of the case arises from the fact that the parties are French, who had been educated in a different language, and were accustomed to a different system of laws from that which prevailed at the time when the agreement was made, and by which it must be construed. We have before had occasion to remark that, in many instances, it is impossible to translate an agreement made in one language by parties speaking that language alone, into another, so as to convey to those speaking the latter language only, the precise idea intended to be expressed

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by the parties to such agreement. In the present case, the agreement in French, when translated into English, does not, by any means, express the contract of the parties in the form or terms that would be used by any party accustomed to the common law in reducing the same contract to writing in the English language. Nor is it to be expected that it would. But the object of construction is to ascertain, if possible, from the language used, the intention of the parties. In this instance, although the form of expression is not such as would have been adopted by one using the English language in drafting a common law document, we think, upon a careful view of the whole instrument, there can be little doubt as to *what was really contemplated. The amount to [388] be paid by Mr. Vignes to his children was fixed by the agreement. The amount to be paid for one half the mother's share—"the first quarter" [of the whole estate]—as expressed in the instrument, was due at once, as there is no time specified. The remaining sums of five thousand five hundred dollars each for the other half, or "second quarter," Mr. Vignes was to have the use of, if he desired, and they were to be payable during life, or after his death, at his option. The amount was doubtless made larger in consequence of the postponement of the time of payment. It was further provided that "the total sum shall be guaranteed by (warranted by, secured by, made good by) the property in the pueblo called the 'Aliso,' if he does not sell it; or by the consideration money (price of purchase) if he does sell it." These were the acts to be performed by Vignes, and the rights acquired by the children. On the other hand, "the acceptation of these conditions (execution of the instrument or agreement) extinguishes all rights [of the children], holds the place and stead of a final settlement, confers on Vignes all the rights enjoyed by (devolving on) a sole and only proprietor, and grants him the right to act in that capacity either in the presence or absence of the said heirs, or their representatives, subject, however, to his complying with the guarantee stipulated for the sum allowed." These are the rights conferred on the father. We have little doubt, after a careful examination of this language, that it was the intention of the parties to make

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the total sum provided for in the second article, at least, chargeable as a lien upon the land, so long as it should remain unsold, and the property of the father; and, in case he should sell it, that he should secure it in some mode on the purchase money. Had the father died, still owning the land, we think, under the terms of this agreement, the said sums due would, by virtue of the agreement, have continued to be a lien upon the property. But it was not contemplated that the lien should be an obstacle in the way of a sale, and it was provided that the rights of the heirs should be extin-
[389] guished, and that Vignes *should exercise all the rights of a sole proprietor, and act in that capacity either in the presence or absence of the heirs or their representatives, subject to his complying with the guarantee—that is to say, that if he should exercise the rights and powers of a sole proprietor and sell the land, and thereby discharge it from the lien, it must be on the condition that the moneys due the children under the agreement be at the same time secured on the purchase money. This is manifestly the intent of the parties to the agreement to be gathered from the terms. But the instrument is not under seal, and as to Mrs. Racouillat, at least, is not executed and acknowledged so as to make it a mortgage or conveyance within the provisions of the act concerning conveyances; nor is it entitled to record; nor, being copied into the records, does it impart notice to subsequent purchasers or incumbrancers. Still, in equity, the instrument would be regarded as an executory agreement for a mortgage, or a security in pursuance of the intentions expressed, and in a court of equity it would be held to be, and enforced as a specific lien upon the land. We so held at the last term in Daggett *v.* Rankin, 31 Cal. 321. In that case we said: "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged. (1 Am. Lead. Cas. in Eq. 510; Howe's Case, 1 Paige, 125.) The maxim of equity upon which this doctrine rests, is, that

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equity looks upon things agreed to be done as actually performed; the meaning of which is, that equity will treat the subject-matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been. (Sto. Eq. Jur., secs. 64, 790; Willard's Eq. 298–9, 422.)" This covers the point. The agreement, then, in equity, constituted a lien upon the premises, as against the father, while they remained unsold, which would be enforced as against *him, and by which strangers having actual [390] notice would be affected. It was an incumbrance on the land which might be removed by a sale and substituted security on the purchase money.

On the 3d of April, 1855, Jean Louis Vignes, the father, conveyed the said "Aliso" property to the defendants, Pierre and Jean Louis Sansevain, with a covenant "that the said premises were free and clear of all incumbrances of what nature or kind soever" as we have seen, and said defendants Sansevains, "to secure the payment of part of the purchase money of said property," mortgaged the same back by deed of mortgage bearing the same date, duly acknowledged and recorded. Said mortgage contained the following covenants, viz.: "This grant is intended as a security for the payment of, to the party of the second part, as follows, to wit: That the parties of the first part agree and promise to pay to the party of the second part the sum of two thousand five hundred dollary each and every year during the natural life of the said party of the second part, said sum to be paid at such time during each and every year as the said party of the second part may request. That the said parties of the first part will also give to the said party of the second part the use, free of rent or charge, of the north wing of the building on the premises aforesaid, and the 'orangery' or inclosure in the rear thereof, during the period of the natural lifetime of the said party of the second part. That the said parties of the first part will also give to the said party of the second part the full, free, and unlimited privilege to pass and repass over and about and upon any of the premises aforesaid. That the said party of the first part will give and pay to Jean Vignes, son of the

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party of the second part, during the natural life of the said Jean Vignes, the annual sum of eight hundred francs, whenever and wherever they may be thereunto requested, and also pay the expenses of a passage for the said Jean Vignes to France, and that the said parties of the first part will also pay and discharge all legal mortgages and incumbrances, of whatever nature and description, upon the aforementioned
[391] and *described property, at and previous to the present date, whenever the same shall become due."

At "the time of the execution and delivery of the deed last aforesaid (Vignes to Sansevain) and of the mortgage from defendants Sansevains to Vignes, both of the said Sansevains had actual notice of the instrument in French, marked 'Exhibit D'"—the said agreement of March 13th, 1851, between said Vignes and his children.

At the time of the execution of said mortgage by said Sansevains to Vignes, there was also duly recorded in the office of the Recorder of Los Angeles county a mortgage upon said "Aliso" property, executed by said Jean Louis Vignes to Tobi & Schlessinger, to secure the payment of the sum of three thousand dollars and interest, which was subsequently paid at maturity by said Sansevains. These are the only incumbrances upon said property at that time, disclosed by the record.

The next question in order is whether, upon this state of facts, the lien provided for in said agreement of March 13, 1851, between Vignes and his children, is a legal incumbrance, within the meaning of the term, as used in the condition of the mortgage from the Sansevains to Vignes, which they expressly covenanted to pay, and for which they thereby became personally liable. We are satisfied that it is. There appears to have been at the time but one other incumbrance; and the covenant does not refer in express terms to that particular mortgage to Tobi & Schlessinger, as we should naturally expect it would, if the intention had been to limit the covenant to that incumbrance; but, on the contrary, the covnant is that they (the Sansevains) "will also pay and discharge *all legal mortgages and incumbrances of whatever nature and description* * * * *at and previous to the present date.*" This

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language is certainly sufficiently comprehensive to include everything in the nature of an incumbrance, of which the covenanters had notice, actual or constructive, at the time; and, when construed with reference to the circumstances of the parties and property, we cannot doubt that the lien in *question was intended to be, and is, embraced [392] within the terms of the covenant. Vignes had agreed with his children that the amount to be paid to them, in the second article at least, should be secured on the land, *if he did not sell it*, and *on the purchase money, if he did sell it.* And, upon the condition that he should so secure it, he was authorized to sell. Upon a sale he was, therefore, under obligation to provide for securing the amount on the purchase money. He was about to sell, and must be supposed to have had this obligation in his mind in settling upon the terms and conditions of the sale. The Sansevains also had notice of the agreement and the said obligations of Vignes. A personal covenant in the mortgage on the part of the Sansevains to pay this incumbrance, and a security in the mortgage for the performance of the covenant, would be a security upon the purchase money and a discharge of the obligation of the father, contained in the said agreement with his children. If the claim of the children is not embraced in the covenant of the Sansevains, their claims would not be secured on the purchase money, and the obligation of the father would not be fulfilled, unless it could be enforced as a lien, notwithstanding the omission. We think, however, upon viewing the instrument in connection with the surrounding circumstances, the only reasonable inference is that both Vignes and the Sansevains had in view the said agreement and obligation of the former, and intended to provide, and did provide, for it in the covenant in question. Appellants' counsel lay great stress upon the term "*legal*" used in the covenant—"all *legal* mortgages and incumbrances"—and insist that the incumbrance is, at most, only an *equitable*, and in no sense a *legal*, incumbrance, and therefore not within the covenant. The word "legal," we apprehend, was not used here as contradistinguished from equitable. These French gentlemen, who were educated under the civil law which had so recently been abrogated, could

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hardly have been so critically informed of the nice distinction between legal and equitable incumbrances, as these terms are used in the common law and equity jurisprudence of
[393] England and the *United States. If it had been their intention to make this nice distinction, they would have been much more likely to have adopted some other and less technical mode of expressing their ideas. The word *legal*, in this connection, doubtless signifies nothing more or less than *lawful;* and we have before seen that the law recognizes the claim of the children under their contract with their father, as a lien or incumbrance, which a court of equity will enforce. But, admitting a lien in favor of the plaintiffs while Vignes owned the land, and that the defendants Sansevains had notice, it is further urged that Vignes, by the terms of the agreement, was authorized to sell and substitute a security upon the purchase money; that he did sell, and by the act of sale the lien was discharged, and from that moment ceased to be an incumbrance; and that there was, therefore, no incumbrance to which the covenant could apply. But the sale to the Sansevains and the mortgage back to secure the purchase money were cotemporaneous acts, and part of one and the same transaction. The personal covenant to pay the incumbrance, with the mortgage to secure the performance of the covenant, was a part of the contract of sale—the very condition upon, and the means by which, the incumbrance originally existing was discharged and a new one substituted. Besides, the covenant itself affords another and insuperable answer to the objection. The language expressly is: "Will also pay and discharge all legal mortgages and incumbrances, of whatever nature and description, * * * at and *previous to* the present date." If the incumbrance ceased by the act of sale, it was still an incumbrance "*previous to the present date*"—the date of the act of sale—and was still within the covenant.

The conveyance from Vignes to the Sansevains, as we have seen, contains a covenant "that the said premises were free and clear of all incumbrances of what nature or kind soever," while the mortgage of the Sansevains contains a seemingly inconsistent covenant on their part to "pay and discharge all legal mortgages and incumbrances, of whatever nature and

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*description," etc. And it is argued that as these two [394] instruments must be construed together as parts and parcels of one and the same transaction and agreement, some effect must, if possible, be given to the covenant in the deed as well as to the covenant in the mortgage; that no effect can be given to the covenant in the deed unless it be held that although the Sansevains are to pay and discharge the incumbrance, they are still to charge it to Vignes, in their account with him, as a part of the purchase money, and that the object of the covenant manifestly was to protect themselves against the claims of the plaintiffs, rather than to benefit the plaintiffs. Admit this to be so, for the purposes of the argument, and we are still unable to discover that any inference favorable to the appellants follows from the premises. The amount of the incumbrances thus assumed may still be a part of the purchase money agreed to be paid. It nowhere appears in the record that the whole amount of purchase money has ever been paid. On the contrary, it is substantially found by the Court that, although receipted for, the forty thousand dollars was not paid, and that the amounts covenanted in the mortgage to be paid by the Sansevains was a part of said sum of forty thousand dollars and of the purchase money. The language of the finding is: "For the consideration of forty thousand dollars, which was receipted for by the said Vignes, and consisted in part of the *sums secured by the mortgage next herinafter mentioned.*" According to our construction of the several instruments, the amount to be paid to the plaintiff under the personal covenants of the Sansevains is a part of the sum secured by the mortgage—it was also so held by the District Court—and it is therefore found by the Court to be a part of the said sum of forty thousand dollars consideration money. And this is really in harmony with the construction which, appellants' counsel say, must be put on the covenants in the conveyance to the Sansevains, and in theiu mortgage back, when regarded as a part of one composite instrument. In this way the Sansevains could effectually protect themselves against the incumbrance of the plaintiffs by discharging it *when due—that is to say, on the death of [395] Vignes—out of the purchase money reserved in their

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hands for that purpose, and thus the object of the covenants supposed by appellants' counsel would be fully accomplished.

It may be doubted whether the sums specified in the "first quarter" were designed to be, or were, embraced in the terms of the stipulation for security upon the land if not sold, or on the purchase money if sold. As before remarked, no time for payment of those sums is specified, and they became due immediately. It was, doubtless, supposed that they would be paid soon. But the sums specified in the second article were to remain unpaid till the decease of the father, if he should so choose, and it would be natural that security for ultimate payment should be desired. It is not clear that the security provided for was not designed to be limited to those sums. The agreement is, perhaps, open to such construction, and this seems to have been the practical construction put upon it by the parties; for, it is found, "that Elizabeth Vignes received from the Sansevains the sum of three thousand dollars, mentioned as coming to her in the instrument of March 13th, 1851, * * * paid on account of the said Vignes out of the annuity aforesaid;" that is to say, out of the two thousand five hundred dollars per annum covenanted by the Sansevains in their mortgage to be paid said Vignes during his life. The three thousand dollars mentioned is found in the first article of the agreement of March 13th, 1851. Other sums were paid to other of the plaintiffs out of said annuity, but, whether on account of the sums due under the said agreement, or for some other purpose, does not appear. But whether this is the proper construction or not, we are unable to perceive from the record that the aggregate of the sums actually paid, or covenanted to be paid, or that the defendants were liable to be called upon to pay, under the construction we have given the contract, was likely, under any contingency, to exceed the consideration named. That portion of the purchase money depending upon the number of years Vignes might live, was, of course, necessarily indefinite as to amount. [396] But *he was aged and infirm, and not likely to survive long, and the defendants, Sansevains, by their covenant, took the chances as to the extent of their liability depending upon his decease. Besides, Vignes, by his agree-

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ment with the plaintiffs, was to have the use, during his life, of the several sums not payable till his death, and the two thousand five hundred dollars to be paid to him annually by the Sansevains, may have been, and probably was, the interest on these sums. By receiving the interest he enjoyed the use of the principal. The aggregate amount due the children on the second quarter was twenty-two thousand dollars, and two thousand five hundred dollars per annum would be less than one per cent. per month interest—not an extraordinary rate of interest for this State at that time, or even since.

Nor can any inference affecting the question be drawn from the covenants to pay a certain small sum annually to the son, Jean Vignes, during his life, or the other covenants for his benefit. We do not know what arrangements the Sansevains entered into with him in connection with these transactions. He declined to join in this action, and his claim must be presumed to have been satisfactorily arranged.

We have now discussed all the points made in the briefs and arguments of counsel necessary to a determination of the cause, under the view we take, so far as the appellants, the Sansevains, are concerned, and the result is that the amount due plaintiffs under the second article of the agreement of March 13, 1851, was an incumbrance on the "Aliso" property within the meaning of the covenants in their mortgage to Vignes, and that they are personally liable for the same upon their said covenants "to pay and discharge all legal mortgages and incumbrances." The judgment as to them, therefore, must be affirmed.

As against Requena, executor, the judgment is not technically in the proper form. It should be that he "pay in due course of administration" the amount found to be due from the estate of Vignes. (Prob. Act, sec. 140.) The form is that the plaintiffs do have and recover "against Manuel *Requena, as executor of the last will and testament [397] of J. L. Vignes, deceased, the sum of," etc. Perhaps, though not in the form prescribed by the statute, the legal effect may be the same, and possibly, under the law, the plaintiffs may not be authorized to enforce the judgment against the property of Requena. To avoid any doubt, the

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judgment had better be corrected. This may be done by adding at the end of the judgment the words: "And it is ordered and adjudged that the said Requena, executor, pay the said sums in due course of administration." As the error is technical, and the contest has really been on the appeal of the other defendants, the modification will be made without costs.

Judgment as to defendants, Pierre and Jean Louis Sansevain, affirmed. As to defendant Requena, executor, judgment modified in respect indicated, but without costs.

Mr. Justice SANDERSON did not express any opinion.

CHARLES G. HIDDEN *v.* DANIEL M. JORDAN.[1]

MORTGAGEE IN POSSESSION.—If permanent improvements, made by a mortgagee in possession, do not cost him anything, he is not entitled to anything for their construction, in an accounting with the mortgagor concerning rents and profits.

ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE.—A mortgagee in possession cannot charge the mortgagor, in an accounting concerning rents and profits, with the cost of constructing new and permanent improvements, unless there are special circumstances requiring their construction.

TAKING ACCOUNT BY REFEREE.—If the Commissioner to whom a case has been referred to take an account, commits an error at the threshold which unsettles the account, the Court is not bound to go over the account and correct the error, but may set aside the report, and again refer the case.

TAKING AN ACCOUNT.—If, in an accounting concerning the rents and profits of land, between the mortgagor and mortgagee in possession, the testimony shows that the mortgagee paid expenses as he went along and had a balance in his hands at the end of the year, he should be charged with such balance.

APPEAL from the District Court, Seventh Judicial District, Solano county.

The facts out of which this controversy arose are
[398] fully *stated in the report of the same on a former appeal found in 21 Cal. 92.

The defendant recovered judgment in the Court below, and

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[1] See notes to same case, 21 Cal. 92; 28 Id. 301.

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the plaintiff moved for and obtained a new trial. The defendant appealed from the order granting a new trial.

W. S. Wells and *Thomas M. Swan*, for Appellant.

M. A. Wheaton, for Respondent.

By the Court, SANDERSON, J.:

This case has been here before on two occasions, and will be found reported in 21 Cal. 92, and 28 Cal. 301. On the last occasion, the judgment was reversed, and the findings, so far as they related to the account between the parties, vacated, and as to the account, a new trial was granted, or a re-accounting directed. Upon the return of the case to the Court below, it was referred to the Court Commissioner for the purpose of taking the account between the parties and reporting a judgment. The Commissioner having made his report, the plaintiff moved for a new trial, which was granted, and the case was again referred. The defendant has appealed from the order granting a new trial.

In taking the account for the year 1859, the referee found that the defendant had expended the sum of one thousand two hundred dollars in building a stone wall upon the premises; that said stone wall was necessary for the protection of the crops, and that it enhanced the rental value of the farm. He therefore, in stating the account for that year, charged the plaintiff with that sum. He also found that for the years 1858 and 1859 the defendant had paid taxes on the farm to the amount of one hundred and ninety-five dollars and nine cents, which sum he also charged against the plaintiff, making the plaintiff's debits for that year amount to one thousand three hundred and ninety-five dollars and nine cents. He further found that the defendant received seven hundred and *twenty dollars as net profits of the farm for [399] that year. This sum he deducted from the amount of the plaintiff's debits for the same period, (one thousand three hundred and ninety-five dollars and nine cents,) leaving a balance against the plaintiff in the account for that year of six hundred and seventy-five dollars and nine cents.

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It is claimed by the plaintiff that the finding that the defendant expended the sum of one thousand two hundred dollars in building a stone wall in 1859 is contrary to the evidence, and hence that the referee erred in charging the plaintiff with that sum in the account for that year.

We have examined all the evidence bearing upon the question to which our attention has been called by counsel. The record contains one hundred and thirty printed pages, and it is the duty of counsel to refer us to all the evidence bearing upon the question, and we assume that they have done so. Such being the case, we are unable to account for the finding in question. The defendant himself testified that he built in person during that year one hundred and twenty-four rods of stone wall; that two thousand yards more were built by one Fowler, who owned adjoining land, as a division fence between them, under an agreement that Fowler was to do the work and the defendant to furnish the materials. Now, as appears from the evidence, the materials were stone dug from the farm. They were then a part of the farm, and as much the property of the plaintiff as the land from which they were taken. Clearly, then, the farm furnished the materials, and not the defendant. Fowler did all the work, as the defendant himself testifies. There was no expense, then, in connection with the two thousand yards built by Fowler which could be a charge in favor of the defendant against the plaintiff.

As to the one hundred and twenty-four rods built by the defendant, we think the testimony shows that the cost, whatever it was, was included with the expenses of the farm by the defendant when he stated the profits of that year at seven hundred and twenty dollars. So also as to the taxes for 1858 and 1859. He testified that he kept no regular books,
[400] but *paid as he went along. If he built the fence in 1859, and paid for it as he went along, its cost must have been included in the account of that year, the balance of which was not ascertained until March, 1860, at which time he sold the crop. He states that he then found himself with seven hundred and twenty dollars in hand, as the profits of the farm for 1859. This sum must, upon the evidence of the defendant himself, be taken as the balance of that year, over

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and above all expenses of farming, taxes, and fencing; for, as he himself states, having paid as he went along, he found seven hundred and twenty dollars in his hands at the end of the transactions for that year. So, instead of being charged, at the end of the year, with the sum of six hundred and seventy-five dollars and nine cents, the plaintiff was entitled to a credit of seven hundred and twenty dollars according to the defendant's own showing. If by the statement that he had in hand in March, 1860, seven hundred and twenty dollars as the profits of the farm for 1859, he did not intend to be understood as including in the account of which that sum was a balance the taxes of 1858 and 1859, and the cost of fencing, it was his duty to so state in a manner not to be misunderstood; for in view of the date at which that sum was in hand being long after the close of the year, accompanied by the further statement that he had paid expenses as he went along, points, unless otherwise explained by him, to the unavoidable conclusion that the sum of seven hundred and twenty dollars was a balance in favor of the farm or the plaintiff over all expenses of every kind for that year.

In reply to this point it is claimed on the part of the defendant, that it was determined by us when the case was here last that the defendant was entitled to a credit of one thousand two hundred dollars for the cost of the stone wall. This claim is without the slightest foundation. We did not undertake to determine the validity or fix the amount of a single item in the account; on the contrary, we vacated the entire proceedings as to the taking and stating of the account and directing a re-accounting from the beginning. We aimed to *do nothing further, and did nothing further [401] than to declare the legal principles by which the taking of the account must be governed. Instead of holding that the cost of this fence must be allowed to the defendant, we stated the general rule to be that the cost of new and permanent improvements could not be allowed, except under special circumstances; and hence that the cost of the stone wall could not be allowed to the defendant unless the testimony showed that it was necessary for the protection of the crops. (Page 309.) With reference to this particular item and one

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other referred to, we said in express terms: "But these items, as we have shown, cannot be disregarded upon the case as now presented by the record. We cannot, of course, tell how the case may appear after a new accounting." (Page 319.) Whether the fence actually cost the defendant anything, or whether the fence was necessary for the protection of the crops, we did not undertake to say. It is not within the province of this Court to find those facts. If the fence cost him nothing, he is entitled to no credit on account of it, even though its construction was necessary for the protection of the crops, or enhanced the rental value of the farm.

In addition to the errors committed by the Court Commissioner, in regard to the account for the year 1859, we understand counsel for the defendant as conceding that he also erred in stating the amount of interest which was due to the defendant at the commencement of that year, and allowed at least two hundred and forty-one dollars and fourteen cents too much, if not three hundred dollars, as claimed by the plaintiff; but it is claimed that neither of these errors or mistakes of the Commissioner necessitates a new trial, or, more properly speaking, a new accounting. We are at a loss to perceive how the Court can correct these errors without going over the entire account. They lie at the threshold, and the whole subsequent account is unsettled by them, making a retaking of the account unavoidable. This the Court [402] was not *bound to do, and it is very clear, therefore, that it did not err in setting the whole account aside and again referring it.

The principles upon which the account must be taken are clearly stated in our former opinion, (28 Cal. 309,) and the referee ought to find no difficulty in following them. To avoid any further misapprehension, however, as to what was determined when the case was here before, we repeat that we did not determine the validity or amount of a single item of the account on either side, but only the legal principles applicable to the accounting.

Order affirmed.

Mr. Chief Justice CURREY did not express any opinion.

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GEORGE DOUGHERTY v. C. FOLEY.

[1] STREET CONTRACTS IN SAN FRANCISCO.—After the Board of Supervisors of San Francisco have taken steps to acquire jurisdiction, and have ordered a public street of said city to be improved, and have let the contract, if the contractor fails to enter upon the performance of the work within the time fixed in his contract to perform, the Board may re-advertise for bids and re-let the contract without taking steps to acquire jurisdiction as in the first instance.

ORDER TO IMPROVE A PUBLIC STREET. — An order to improve a public street, made by the Board of Supervisors of San Francisco, after having acquired jurisdiction, is in the nature of a judgment.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

The defendant recovered judgment in the Court below, and plaintiff appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

O. L. Lane, for Appellant.

The doctrine that a municipal corporation can only act in the cases and in the manner prescribed by its charter (Argenti *v.* San Francisco, 16 Cal. 282; Wallace *v.* San José, 29 Cal. 186) is a stumbling block to the counsel for *the respondent, which he seems incapable of stepping [403] over. He does not find the power *expressly* given to re-let a contract for street improvements, after a contract once entered into, and therefore says the power is not given—that in such case, if the contractor neglect to do the work, the Board of Supervisors must begin *de novo*, and again declare their intention to do the work, and again order the work done before re-advertising for bids. Where he finds the power expressly given to commence *de novo*, we are not informed. And the same objection urged against this contract applies, with equal force, to a case where the Board, in the exercise of its discretion, rejects all the bids. (Stat. 1862, ch. 298, sec. 6.) No power is expressly given, in *that* case, to re-advertise for bids, and the argument of counsel would require the Board,

[1] Approved, Himmelman v. Oliver, 34 Cal. 247; Chambers v. Satterlee, 40 Id. 519.

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for that reason, to commence *de novo*. There must be something wrong in an argument which leads to such an absurdity, or else the act of the Legislature is a piece of stupid blundering. It is not necessary that the power to enter into a contract for improving a street, in a given case, should be expressly given. Such power may be, and often is, implied from the power to cause the improvement to be made. (Argenti *v.* San Francisco, 16 Cal. 263; Cummings *v.* The Mayor, etc., of Brooklyn, 11 Paige, 600; Maurice *v.* The Mayor, etc., 4 Seld. 130; Wetmore *v.* Campbell, 2 Sandf. 341.) The rule as deduced from those cases is: that the power to cause the improvement to be made necessarily includes the power to enter into the contract. This is in accordance with the doctrine, as stated by Kent, that corporations are considered as having the powers specifically granted, and all powers necessary for the purpose of carrying into effect those expressly given, but no others. (2 Kent, 288–9; Oakland *v.* Carpentier, 13 Cal. 545; Wallace *v.* San José, 29 Id. 180.)

Daniel Rogers, for Respondent.

The counsel for the respondent only contends for the well settled principle that a statute in derogation of the common law must be strictly construed, and "that the power [404] *conferred must be executed precisely as given, and that any departure vitiates the whole proceeding." As well remarked by one member of this Court, this doctrine is well expressed in the axiomatic language of Mr. Justice Bronson, in Sharp *v.* Spier, 4 Hill, 76: "Every statute authority in derogation of the common law, to divest the title of one and transfer it to another, must be strictly pursued, or the title will not pass." (Sharp *v.* Johnson, 4 Hill, 92; Curran *v.* Shattuck, 24 Cal. 427; Creighton *v.* Mason, 27 Cal. 628.) The power of the Board of Supervisors, as claimed by the appellants, must be expressly shown to exist by the act conferring the power, and not merely presumed or made out by intendment.

By the Court, SHAFTER, J.:

Action to recover a street assessment. The facts, about

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which there is no dispute, are as follows: The Board of Supervisors of the city and county of San Francisco, after having taken all the steps to acquire jurisdiction, ordered a public street of said city to be improved; and on the 19th of October, 1863, awarded the contract to one H. J. Shafer, as the lowest bidder; and within fifteen days thereafter, the Street Superintendent entered into a contract with said Shafer, in which the time of completion was fixed at one hundred and twenty days. The time was afterwards extended sixty days, making in all one hundred and eighty days. But Shafer not having entered upon the performance of the contract, the Board of Supervisors, after the expiration of said time, on the 25th of July, 1864, re-advertised for bids, and afterwards let the contract to the appellant as the lowest bidder, who performed the work, and now sues on the assessment. On the above state of facts, it is claimed by the respondent that the warrant and assessment roll are void, because the Board had no legal right to again let the contract on the failure of Shafer to do the work, without again taking the steps required in the first instance to acquire jurisdiction.

The Court having acquired jurisdiction in the manner *pointed out in the fourth section of the act of [405] 1862, (Stat. 1862, p. 392,) ordered the work to be done. This order was in the nature of a judgment. The subsequent steps were ministerial in their character. They were taken for the purpose of carrying the order into execution. The failure of the contractor to perform his contract could not on any known principle affect the validity nor impair the efficiency of the order. If the contract had been kept, the order would have been *functus officio;* but as it was not kept, the requirement that the "work should be done" stood unexecuted, and was as mandatory as ever. A neglect or refusal of a party to execute a decree in chancery does not vitiate the decree, nor does a return of *nulla bona*, on an execution at law, drive the creditor to a new action. As the failure of a first attempt to execute a judgment does not preclude the suitor from trying again, so it may be said generally that powers, whether conferred upon individuals or Boards, do not fail for the reason that the first effort to execute them was de-

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feated by the wrong doing of third persons. The argument on the part of the respondent is, that to re-let on the basis of the order after a failure of the contractor would be contrary to the *process* marked out by the statute for doing street work. This we conceive to be a mistake. The work having been ordered, the process of doing it was by contract. When the contract failed by the bad faith of the man who made it, the case stood as it would if no contract had ever been made, and the statute process could be repeated upon the unexecuted order. The argument of the respondent, if pushed to its consequences, would show that by the failure of a contractor the Board would lose all power to deal with the subject-matter, whether *de novo* or otherwise. The power of the Board is commensurate with the exigencies of the order, and while the order remains unexecuted the power of the Board and Superintendent, with respect to it, cannot be considered as exhausted. The circumstance that there are two instances named in the sixth section in which the Board is expressly authorized to re-let upon the order, viz.—where the [406] lowest bidder fails to *enter into a contract within fifteen days, and where the owners who may have taken the contract do not complete the same within the time limited—does not argue that the Board cannot re-let where the statute process breaks down by the default of the lowest bidder after he has taken on the character of "contractor." We consider, in this instance, that the statement of the two cases referred to are put by way of example, and not as excluding other cases of similar nature. (Smith Com. 655.)

Judgment reversed, and new trial ordered.

CHARLES L. WILSON *v.* HIS CREDITORS.

[1] PETITION IN INSOLVENCY. — A petition in insolvency may be addressed to the Court, or the Judge thereof, and may be entitled as being in the matter of the application of the insolvent to be discharged from his debts, though not necessarily so. It may be brief and refer to the schedule.

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[1] Cited, Barrett v. Carney, 33 Cal. 541.

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IDEM.—If the insolvent wishes to be discharged from debts not described, or imperfectly described in his schedule, he must so state in his petition.

IDEM.—The insolvent need not sign his petition, nor is it indispensable that it be signed by his attorney, but the insolvent must sign personally at the foot of the schedule.

IDEM.—The petition and schedule constitute one paper, and constitute the complaint.

IDEM.—The schedule of an insolvent must be verified, but the petition need not be verified.

SCHEDULE OF INSOLVENT.—The schedule of an insolvent should consist of three parts, and the inventory of his estate should be made as full and complete as possible; but in the enumeration of his losses and debts there is no special reason for much exactness or detail.

OPPOSITION TO DISCHARGE OF INSOLVENT. — Creditors may oppose the discharge of an insolvent on two grounds: first, any supposed illegality in the appointment of an assignee; and second, any supposed fraud committed by him. Opposition on the first ground raises an issue of law as to the validity of all the previous proceedings; on the second, an issue of fact.

PLEA TO CHARGE OF FRAUD.—To the charge of fraud, the insolvent may demur, or he may plead guilty or not guilty.

DEFECTIVE SCHEDULE OF INSOLVENT. — If in the opinion of the creditors the schedule of the insolvent is defective, they should reach the defect by making a charge of fraud, and on the trial examine the insolvent on oath, and in that way elicit information as to his affairs, and not by a demurrer.

STATEMENT OF INSOLVENT'S LOSSES. — A summary statement of the insolvent's affairs and a list of his losses may be inserted in his petition instead of his schedule.

*IDEM.—If the insolvent's statement of his affairs and list of losses and estate [407] is meagre in detail, the defect cannot be reached by an objection to the same as to matter of substance.

APPEAL from the County Court, Placer county.

The demurrer of the creditor was overruled, and his motion for a rule on the insolvent was denied. The Court discharged the insolvent from his debts, and the creditor appealed. The insolvent was a married man, having several children, and stated the value of his household furniture to be one thousand dollars.

The other facts are stated in the opinion of the Court.

H. H. Hartley, for Appellant.

George Cadwalader, for Respondent.

By the Court, SANDERSON, J.:

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This is a proceeding under the act for the relief of insolvent debtors and the protection of creditors.

One of the creditors contested the discharge of the insolvent to the extent of filing what purports to be a demurrer to the petition and schedule, and also a motion for a rule upon the insolvent to amend his schedule and make the same more definite and certain in respect to his losses, his estate, and his debts. The demurrer and motion were both filed for the same purpose, and were both resorted to, as stated by counsel, to meet a supposed uncertainty as to what is the proper practice in such cases.

The practice to be observed in conducting proceedings under the Insolvent Act, where the discharge of the insolvent is contested, is not very fully prescribed by the act itself, nor does it seem to have been very definitely settled by the former decisions of this Court. It is important that a uniform mode of procedure should be observed in this class of cases, and we therefore avail ourselves of this opportunity to suggest to some extent what would be in our judgment a proper [408] *practice, without, however, undertaking to say that a different practice might not respond to all the requirements of the statute, or sufficiently meet all the exigencies of a given case.

On the part of the insolvent the proceeding is to be instituted by the filing of a petition and schedule, the latter being annexed or attached to the former. The petition may be addressed indifferently to the Court or the Judge thereof, which has jurisdiction in the premises. (Brewster v. Ludekins, 19 Cal. 170.) It should be, though perhaps not necessarily so, entitled in analogy to proceedings at common law, as in the Court having jurisdiction, and as being in the matter of the application of the insolvent to be discharged from his debts. It must aver that the petitioner is insolvent, that he is a resident of the county in which the proceedings are commenced, and that he has been a resident of the county for six months next preceding the filing of the petition; the nature of the business in which he has been engaged and in which his losses have been incurred; the cause of his losses—as fire, flood, bad debts, fall of stocks, fluctuations in the market, unprofitable contracts,

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and the like. This part of the petition may be very brief and summary, and refer to the schedule as containing the subject-matter more in detail. If the insolvent desires to be discharged from his debts, whether the same be described in his schedule or not, or if so, imperfectly described, he must in addition aver that such is his desire and that he has described all his debts in his schedule to the best of his knowledge and recollection, and that he has described the same as fully as he can according to his knowledge and recollection, concluding with a prayer for leave to make a cession of his estate to some person to be selected by his creditors or appointed by the Court, and that finally he be discharged from all his debts. The petition need not be signed by the insolvent, (Brewster *v.* Ludekins, *supra*,) nor is it indispensable that it should be signed by his attorney. The schedule is annexed, and is a part of the petition, or, in other words, the two are but parts of the same paper, and together constitute what might be called, in analogy to proceedings in civil cases, the pleading or *complaint on the part of the insolvent, and a sign- [409] ing at the close of the schedule is all that would seem to be required. The signing at the foot of the schedule, however, must be by the insolvent personally, for in this respect no one can act for him. (Sec. 33.)

It was said in Brewster *v.* Ludekins that the petition need not be signed by the insolvent but must be verified by him. If by this it was intended to say that the petition, considered as something separate and apart from the schedule, must be verified, we do not find it sustained by any provisions of the statute. The only paper which the insolvent is in terms required to verify is the schedule. (Sec. 4.) There seems to be no reason why the petition should be sworn to, for, aside from the mere jurisdictional facts, it is but the shadow of what is contained in the schedule, which is the principal thing in this connection, and contains all such matters as are material and bear directly upon the ultimate questions involved.

The schedule should consist of three parts: First—A summary statement of his affairs, with a list of the losses which he has sustained, as complete as it can be conveniently made;

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Second—A list of his debts, to whom due, etc.; and Third—A perfect inventory of all his estate, real, personal, and mixed, etc. What each part of the schedule should contain is fully stated in the third and sixth sections of the statute, and a repetition here in detail would not subserve our present purpose. The most material part of the schedule is the inventory of the insolvent's estate, and should be made as full and complete as possible. (Sec. 6.) As already stated, the schedule must be verified before the Judge of the Court in the words of the statute as given in section four. So far as an enumeration of the losses and debts of the insolvent is concerned, there seems to be no special reason for much exactness or detail. As to the former, the principal object would seem to be to show to some extent good faith on the part of the insolvent, by showing the reasons why he has become unable to pay his debts; and as to the latter, to afford such [410] *information as may be required by the Court, and especially the assignee in settling the estate, and, in connection with the inventory of the estate, that the petitioner is in fact insolvent. But pass these matters. The questions with which we propose to deal are questions of practice only. Suppose the schedule is defective, or does not, in the opinion of the creditors, come up to the requirements of the statute, How are they to proceed? It was suggested in Bennett *v.* His Creditors, 22 Cal. 42, and in Grow *v.* His Creditors, 31 Cal. 328, that they might proceed by motion for a rule upon the insolvent to amend in the particulars desired; but upon further reflection, we are of the opinion that the more regular mode, and, perhaps, the only proper mode, would be to follow the course prescribed in the twentieth and twenty-second sections, which seem to constitute the only proceeding contemplated by the statute on the part of the creditors, and the only mode by which they are to be heard. Those sections provide as follows:

"SEC. 20. That in case after the appointment of said assignees, any one of the creditors of the insolvent debtor should deem necessary to oppose it on the ground of some fraud having been committed by the said insolvent debtor, or

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of the appointment not having been legally made, he shall within ten days next following the appointment of said assignees, lay before the Court which has already taken cognizance of the case, his written opposition, stating specially the several facts of nullity of the said appointment, or of fraud by him alleged against the insolvent debtor, whereupon, in case of accusation of fraud, after having received the said insolvent debtor's answer, the Court shall order a jury to be summoned of not less than six men, to be summoned in the same manner as juries are summoned in the District Court, for the purpose of deciding on said accusation."

"SEC. 22. Upon such an accusation of fraud, the creditor who shall have brought the same shall have the right to interrogate the insolvent debtor on oath, and put to him such *written questions as to the state of his affairs [411] and the several transactions in which he may have been engaged anterior to his failure, as he shall think proper; and the insolvent shall answer, in writing, to the said interrogatories, in a pertinent and distinct manner; and every equivocal answer on his part shall be construed against him."

So the creditors may oppose the discharge upon two grounds: first, any supposed illegality in the appointment of the assignee which would raise an issue of law as to the validity and regularity of all the previous proceedings; and second, any supposed fraud on the part of the insolvent within the meaning of sections twenty-seven to thirty-two, both inclusive, which would raise an issue of fact to be tried by a jury on a plea of not guilty by the insolvent. If the defects complained of under the first head can be cured by amendment, the insolvent should be allowed to amend, in analogy to like proceedings in civil cases. To a charge of fraud, the insolvent may object, as by demurrer, that the facts stated do not amount to fraud within the meaning of the act. If overruled, he must plead guilty or not guilty. If the latter, a jury must be called. On the trial, the insolvent may be examined on oath in the mode prescribed in section twenty-two, and in that way any information as to his affairs, losses, debts, and estate, not furnished by his schedule, may be

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elicited. The verdict of the jury should be guilty or not guilty, or if the former, they may be instructed, if desired by the parties, to find the facts specially, which course has obvious advantages in case of further proceedings on appeal.

Such, we think, is the practice contemplated by the statute and the practice which ought to be observed.

The course suggested was not pursued by the contestant in this case with technical exactness. The paper filed by him is in name and form a demurrer to the petition and schedule, such as is used in civil actions, and not a protest or objection to the appointment of the assignee on the ground of any supposed invalidity or irregularity in the previous pro-
[412] ceedings. *But as the substance and not the name and form is the thing to be regarded, we hold that the objections to the previous proceedings were taken substantially in conformity with the provisions of the statute.

The first objection is that the schedule does not contain a summary statement of the affairs of the insolvent, accompanied by a list of his losses; and such is the fact. The only matters referred to or treated in the schedule are the estate and debts. Annexed to the petition are two schedules: the first is denominated "Schedule A," which treats of the estate; the second is denominated "Schedule B," and treats of the debts. All that is said upon the subject of losses is found in the petition, and it is claimed on the part of the respondent that what is there said is all that is required, and that it was properly enough said in that place. On the contrary, the appellant contends that the summary statement of the affairs of the insolvent, and the list of his losses, required by the statute, must be given in the schedule and not in the petition. This is technically true, as we have already seen, but the reason why such should be the rule, urged by the appellant, is certainly unsound. It is because the schedule has to be sworn to by the insolvent, while the petition does not. That the schedule must be verified by the insolvent is true, but upon an examination of the verification prescribed by the statute it will be found that it contains nothing whatever in terms appliable to the summary statement of the insolvent's affairs or the list of his losses. On the contrary, no reference whatever is made to

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anything contained in the schedule except the inventory of the estate and the list of debts and such other matters as they may be said to involve. There is nothing, then, left to be said in support of the proposition that the schedule must contain the summary statement of the insolvent's affairs and the list of his losses, except that such is the rule prescribed by the statute. There may be substantial reasons why the summary statement and list of losses should be verified; and had the statute so provided, a strict compliance with its terms in that respect would be required, for the proceeding is statutory and special, *and where such is the case, relief can be had [414] only by a strict observance of the conditions upon which it is to be granted, (Bennet's Case, *supra*, and Schloss v. His Creditosr, 31 Cal. 201,) but in view of the fact that they are not embraced in the subjects to whith the oath of the insolvent applies, there seems to be no substantial reason why their exhibition should be made in the schedule rather than in the petition; and while the former is undoubtedly the more regular and proper place, because the statute has so provided, we hold that the use of the latter is not such an irregularity as to vitiate the proceedings or require a reversal of the final judgment. To hold otherwise would be to stick in the bark. We can see no reason why a summary statement of the insolvent's affairs and a list of his losses, given in his petition instead of his schedule, does not subserve all the ends contemplated by the statute, and if so, it is not only a sufficient compliance with its provisions, but a strict compliance within the true sense of the rule already referred to as being applicable to cases of this character.

Nor do we think the objection taken to the statement of affairs and list of losses as to the matter of substance, fatal to the validity of the proceedings. That they might have been fuller and more complete in matter of detail may be true, but *cui bono?* As already stated, the schedule of property and debts are the material parts of the insolvent's exhibits. They are the exhibits in which the creditors are mostly interested. It is from them that the fact of insolvency is to be ascertained, and what proportion of the indebtedness the assets will pay, and how they are to be apportioned.

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If the creditors have any reason to snppose that the fact of insolvency is simulated and pretended, or that the insolvent has fraudulently misrepresented his affairs in any respect, and for that reason desire to test his discharge in good faith, sections twenty and twenty-two, above quoted, suggest the course to be pursued, and the latter affords ample means for exhausting the information of the insolvent in matters of detail in reference to every branch of his exhibits.

[414] *What is here said as to the substance of the statement of affairs and list of losses is also applicable to the objection to the inventory of the insolvent's estate. It consists of only two items. The first is full as to the property referred to; the second relates to household furniture only. It might have gone more into detail, and given the exact number of tables, chairs, beds, etc., but in view of the valuation put upon the whole, there is no reason to suppose that the insolvent has more furniture than is necessary for family use, or more than the Court would have set apart to him as exempt from execution; and in the absence of a more direct suggestion from the contestant that he had more than the Court would be likely to set apart, we are not disposed to hold that the Court below erred in not ruling the insolvent to a more definite statement.

In view of the very liberal provisions of the twenty-fourth section of the statute, we also hold that the objection to the list of debts is not well taken.

Judgment affirmed.

M. ARGENTI, EXECUTRIX OF THE LAST WILL OF F. ARGENTI, DECEASED, *v.* E. D. SAWYER, JUDGE OF THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT.

JUDGMENT OF DISTRICT COURT BY DIRECTION OF SUPREME COURT.—If the Supreme Court directs the District Court to enter a judgment in a case in particular form, the District Court has no authority to enter a different judgment from that directed, even if the judgment directed to be entered fails to give the party what was justly or legally his due.

LAW OF CASE.—A decision of the Supreme Court in a case becomes the law of that case in all its stages.

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APPLICATION to the Supreme Court for writ of mandate.

The facts are stated in the opinion of the Court.

John B. Felton, for Petitioner.

Horace Hastings, for Defendant.

*By the Court, RHODES, J.: [415]

In the case of Argenti *v.* The City of San Francisco, reported in 30 Cal. 458, this Court made the following order: "Judgment reversed, and all proceedings subsequent to the entry of the cause on the calendar of the District Court set aside, and the Court directed to enter judgment for the plaintiff for the amount due upon the contracts, to be ascertained by computing the amount of the warrants set out in the complaint, which were drawn in favor of F. Argenti or bearer, together with legal interest on the amount from the date of the warrants, and to enter judgment for costs as above indicated." When the cause was called in the District Court, the plaintiff moved that judgment be entered striking out of the original judgment of April, 1857, the amount of the warrants unsupported by any contract; and for the amount due on the contract set up in the complaint, as determined by the warrants made payable to F. Argenti or bearer, attached to the complaint, and with interest on said modified judgment from April, 1857, at the rate of ten per cent. per annum—that is to say, the original claim to bear interest from September, 1854, till April, 1857, and then the amount of both principal and interest to bear interest to the present time at the same rate. The motion was denied, and the Court directed judgment to be entered in accordance with the order of this Court above cited. This proceeding was instituted to compel the Judge of the District Court to enter judgment in accordance with the plaintiff's motion.

The District Court was clearly right in denying the plaintiff's motion and ordering judgment as was done. It had no authority to enter a different judgment. The duty of that Court was simply to enter a judgment in conformity with the order of this Court. That order is decisive of the character of

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the judgment to which the plaintiff is entitled. It is therefore unnecessary to consider whether the original judgment should have been ordered to be modified, or whether the plaintiff was entitled to interest upon interest, or [416] whether the *judgment of this Court would have been modified if it had been asked for in proper time, so as to give interest upon the interest that had accrued up to April, 1857. The judgment of this Court concludes the parties, and it is too late now to change it; and certainly the District Court has no authority to modify, change, or disregard it in any respect, even admitting that with regard to the interest it fails to give the plaintiff what was justly or legally his due.

Mandamus denied.

Neither Mr. Justice SAWYER nor Mr. Justice SHAFTER expressed any opinion.

JOHN T. PORTER *v.* FELIX D. ATHERTON AND F. S. SPRING.

CONSTRUCTION OF CONTRACT FOR PARTITION OF LAND.—A contract between A. and B., tenants in common in a tract of land, by which it is agreed that B.'s interest in the land shall be a certain amount in excess of what he otherwise owned, and that B. shall extinguish all claim of title in the land set up by C. by procuring C.'s deed, (C. then asserting an interest in the land claimed by A.,) and that after certain other events transpire, a division of the land shall take place between the contracting parties, according to the contract, and deeds be exchanged, is not fulfilled by B. by having procured C.'s deed *before* the contract was made, nor by procuring C.'s deed to himself, unless he then conveys to A.

IDEM.—The fact that C. had no valid title to any of the land does not excuse B. from procuring a conveyance from him to A. after the contract was made, before B. can go into equity to enforce a specific performance.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

The plaintiff recovered judgment in the Court below, and the defendants appealed from the judgment and from an or-

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der denying a new trial. The plaintiff also appealed from a part of the judgment.

The other facts are stated in the opinion of the Court.

J. S. Blatchley, for Defendants and Appellants.

If A. contracts with B. to extinguish the claim of C. by *procuring a deed from him, two conditions are [417]* involved: 1. That *at the date of the contract* C. is making a claim. 2. That by a future action of A. that claim is to be extinguished. The claim existing at the date of the contract cannot have been previously extinguished by any past action of A.'s, because the contract pre-supposes the existence of the claim. If it has already been extinguished, the very subject-matter of the contract is gone. There is no claim on which to base a contract for its extinguishment. If there is a claim existing at the date of the contract, no past action of A.'s has extinguished it; consequently the claim which Leese and wife were making in December, 1861, could not have been extinguished by the deed dated August 1st, 1860: the contract itself pre-supposes the existence of the claim, notwithstanding that deed. That deed cannot be considered an extinguishment of the claim. (Strickland *v.* Turner, 7 Exch. 208; Fry Spec. P. 355–6; Bryant *v.* Busk, 4 Russell, 1.) The delay in obtaining a deed from Rosalie Leese has been such, and the position of the parties has so changed in the meanwhile, that (even if a new deed should be tendered) it would now be inequitable to enforce a specific performance. The plaintiff should be left to his action for damages. (Green *v.* Covillaud, 10 Cal. 317; Weber *v.* Marshall, 19 Id. 447, 459; Brazier *v.* Gratz, 4 Wheat. 528; Pratt *v.* Carrol, 8 Cranch, 471; Perkins *v.* Wright, 3 Har. & McHen. 326.)

B. S. Brooks, for Plaintiff and Respondent.

The defendants have abandoned some of the grounds they argued in the Court below. Their first point is, that the deed of Leese and wife to M. G. Vallejo, dated August 1st, 1860, did not satisfy a contract made December, 1861, "to extinguish the claim of Leese and wife, by procuring from those parties deeds of grant, bargain, and sale to the rancho." The

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covenant applied to Rudolph Steinbach also. It was admitted that Vallejo obtained a deed from Steinbach. The language was evidently copied or left unchanged from the former [418] *contract. Perhaps, in strict construction, the defendants are right. But the substance of the agreement was that he should acquire their interest. What matters it whether he had already acquired it or acquired it afterward? Equity looks at the substance, not at the form. The difference in mode works no damage to the defendants. The second point is: "The delay in obtaining a deed from Rosalie Leese has been such, and the position of the parties has so changed in the meanwhile, that (even if a new deed should be tendered) it would now be inequitable to enforce a specific performance. The plaintiff should be left to his action for damages." I am not able to perceive how the defendants are damaged by any delay in procuring the deed of Mrs. Leese, since they have, without any effort or expense on their part, acquired her interest; nor how they can complain of delay, when we had already obtained the deed when we made the contract. Nor do I perceive that the condition of affairs is at all changed in consequence. The partition suit was necessary to set off the interests of the other heirs. The Court finds, what is indeed manifest, that *that* was a necessary preliminary, and no change has taken place except what is effected by that proceeding.

By the Court, SANDERSON, J.:

This is an action to compel the specific performance of a contract in relation to the partition of the Rancho Bolsa de San Cayetano, in Monterey county. The contract was between Mariano G. Vallejo and José Jesus Vallejo, two brothers who, with nine other children, inherited the rancho from their father, Ignacio Vallejo, who died in 1835.

The plaintiff sues as the successor of the former, and the defendants are sued as the successors of the latter with notice of the plaintiff's equity. The contract bears date December 15th, 1861.

In order to understand the main question, it is necessary to state somewhat in detail the leading facts of the case. The

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labor, however, will mainly accomplish a double purpose, for *when we have stated the case, it will also [419] appear that we have substantially decided it.

The eleven children on the death of their father took the rancho by descent as tenants in common, each taking an undivided eleventh part. In 1854, Juan Antonio, one of the children, purchased the interest of his sister Rosalie, then the wife of Jacob P. Leese, and took a deed therefor, which was recorded, but was so defectively acknowledged as to pass no title.

In 1860, José Jesus being desirous of purchasing, so far as he could, the shares of his co-heirs, for that purpose borrowed from the defendants the sum of forty thousand dollars, and to secure its repayment, gave a mortgage upon his interest and such other interest as he might thereafter acquire. He afterwards purchased the interest of his brother Juan Antonio, including that of his sister Rosalie. Juan Antonio died before the deed was made, but José Jesus afterwards acquired his entire interest. After his purchase, José Jesus discovered the defects in Rosalie's deed to Juan Antonio, and on the 1st day of August, 1860, initiated proceedings to remedy the same under the provisions of the act of the 13th of April, 1860, "concerning certain acknowledgments of deeds and other instruments affecting real estate." (Stat. 1860, p. 179.) That act authorizes the amendment of defective acknowledgments by the means and in the mode therein designated. The amendment of the acknowledgment was accomplished on the 15th of August, 1860, and the deed was again recorded on that day.

The plaintiff's grantor, Mariano G. Vallejo, seems to have discovered the flaw in José Jesus' title to the interest of Rosalie about the same time. At all events, on the 1st day of August, 1860, the same day on which José Jesus commenced proceedings to weld the flaw in his title, Mariano, accompanied by counsel, appeared at the residence of Rosalie and obtained from her and her husband a deed, with no flaws in the acknowledgement, for which he gave her in return a promise that he would, when the rancho was partitioned, *convey back one hundred acres, being less [420]

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than one-eighth of her interest. This deed was immediately deposited by the attorney of Mariano in the Recorder's office for record; but it was afterward lost, and never recorded.

After these transactions, Rosalie continued to assert a claim to a share in the rancho, and one Steinbach also seems to have had some claim, but what it was the record fails to show.

At this stage of the proceedings, and in view of these conditions, the contract in question was made. The following is a copy:

"Memorandum of agreement between M. G. Vallejo, of the one part, and José de Jesus Vallejo, of the other part.

"Witnesseth that for the purpose of this agreement it is stipulated and agreed that the interest of M. G. Vallejo in the Rancho San Cayetano, situated in the county of Monterey, shall be equal to eleven hundred acres of land, of average value, relatively, to the whole rancho.

"M. G. Vallejo agrees to extinguish all claims of title or interest in the said rancho set up by Jacob P. Leese and wife, and also by Rudolph Steinbach, by procuring from these parties a deed of grant, bargain, and sale, to said rancho.

"When the survey of said rancho shall have been confirmed, and the adverse claim of a part of said rancho known as the 'Pico Claim' shall have been finally adjudicated, and when said José de Jesus shall have acquired title to the interest in said rancho, now in the estate of Juan Antonio Vallejo, deceased, then a subdivision of said rancho shall take place and a valuation be placed upon each subdivision thereof; after which, said M. G. Vallejo shall first select a quantity of land equal to one-half of his interest, and then J. J. Vallejo shall select a quantity equal in value to four times that selected by M. G. Vallejo; and then M. G. Vallejo shall select a quantity equal to the balance of his interest, and the remainder shall belong to the said José de Jesus. The parties shall then exchange deeds according to said partition and division. If the aforesaid 'Pico Claim' shall be ad-
[421] judged finally favorably *thereto, and adverse to the Vallejo claim to said rancho, then the interest of said M. G. Vallejo shall be reduced from eleven hundred acres in

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the same ratio that the 'Pico Claim' takes away from the whole property—that is to say, if the Pico title is adjudged to be good to one-half of the rancho, then M. G. Vallejo's interest would be but five hundred and fifty acres.

"In testimony," etc., dated December 15th, 1861.

In duplicate signed:

JOSE DE JESUS VALLEJO. [SEAL.]
By W. W. Stow, his Attorney in fact.
M. G. VALLEJO. [SEAL.]

On the 28th of November, 1863, José Jesus conveyed his entire interest to the defendants, with the understanding, however, that the mortgage should not be merged in the deed, and that any surplus remaining should inure to his benefit. This deed was intended in part as a further assurance, but was mainly given to facilitate a partition by suit, attempts to partition by contract having failed; and was taken by the defendants with notice of the contract of the 15th of December, 1861.

Suit for partition was afterwards instituted by the defendant as the successor of José Jesus, which went to a final judgment, by which was set apart to Mariano his interest as heir only, and to the defendants the entire interest of José Jesus, including the share of Rosalie, who was not, however, a party to the action. The judgment concluded with this clause: "Saving to the said defendant, Mariano G. Vallejo, or to his successors in interest, any equitable right which he may have, if any, as against José Jesus Vallejo, or his successor in interest, under or by virtue of a certain agreement made between the said José Jesus Vallejo and Mariano G. Vallejo, on the 15th of December, 1861. * * * But this saving is not in any way to affect the decree as to any other party thereto, or to affect in any way the legal title to any parcel as therein the same is declared between the respective parties."

Pending this action for partition, Mariano conveyed his *interest in the rancho and assigned his interest in [422] the contract of the 15th of December, 1861, to the plaintiff. After his purchase, the plaintiff demanded a deed from Rosalie and her husband, who refused to give it. He

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then brought an action to compel them to convey, which is still pending. After partition had been made as aforesaid, the plaintiff, claiming that the contract had been fully performed on his part by Mariano, and adopting and using the map, subdivisions, and valuations which had been made for the purposes of said partition, selected five hundred and fifty acres, being one-half of his interest, as settled by said contract, and called upon the defendants to make their selections under the contract, and thereby enable him to complete the selection of his eleven hundred acres. The defendants refused. Hence this action.

At the trial, the defendants admitted that the contract had been performed on the part of the plaintiff, except as to the extinguishment of the Pico claim and the claim of Leese and wife, as to which they denied performance. There was testimony tending to show that the contract had been performed as to the Pico claim, and the Court so found, to which the defendants took and now take no exception.

On the question of performance, the Court made two findings, as follows:

"8. That the said Mariano G. Vallejo, prior to the conveyance to plaintiff, did extinguish all claims of title or interest in the said rancoo set up by Jacob P. Leese and wife, and also by Rudolph Steinbach, by procuring from the parties deeds of grant, bargain, and sale to himself of said rancho. The deed from Leese and wife was made August 1, 1860, was of all their right, title, and interest, was duly acknowledged by both, but was not recorded, and is lost."

"17. That said Mariano G. Vallejo, as well as the said plaintiff, have fully and faithfully kept, fulfilled, and performed everything in the said agreement contained on the part and behalf of the said Mariano G. Vallejo, or the plaintiff, [423] to be *kept, fulfilled, or performed, but the said defendants wholly neglect and refuse to perform and fulfil the same on their part."

To these findings, so far as they relate to a performance of the contract as to the claim of Leese and wife, the defendants

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excepted, claiming that the deed from Leese and wife to Mariano, of the 1st of August, 1860, more than a year prior to the date of the contract sought to be enforced, was not the deed for which they contracted, and that no other deed having been made since the contract, there had been no performance in that respect. This is the point of the defendants' appeal.

The plaintiff complains of the mode of performance which was decreed by the Court, claiming that it is not in accordance with the terms of the contract; but we shall have no occasion to look into the plaintiff's appeal, and therefore pass it without further notice.

The acts to be performed by Mariano Vallejo under the contract were "to extinguish all claims of title or interest in the said rancho set up by Jacob P. Leese and wife, and also by Rudolph Steinbach, by procuring from these parties a deed of grant, bargain, and sale to said rancho." We think that the case made by the plaintiff fails to show that either of these acts had been performed prior to the commencement of this action, and that this is obvious from the dry statement of the facts which we have already made. The acts to be done, and how they are to be done, are stated with precision in the contract, and nothing short of deeds of grant, bargain, and sale of the rancho thereafter legally made and executed by Steinbach and by Leese and wife to José Jesus, procured and tendered to him or his grantees by Mariano or his assignee, the plaintiff, could amount to performance. Deeds from these parties to Mariano or the plaintiff, had they both been obtained, would not have satisfied the contract. A further deed from Mariano or the plaintiff, made and tendered, would have been necessary. A deed from Steinbach to Mariano was obtained, but no deed *was made or tendered by the [424] latter or the plaintiff to José Jesus or his successors, the defendants.

It does not matter whether Leese and wife or Steinbach had any valid claim to the rancho or not. The bare making of the contract assumes that they had a claim of some sort. But admit that they had not, it is clear that José Jesus, for some cause not difficult to conjecture, looked upon them as the enemies of his title, and he desired to quiet that title as

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against them. To do this was the undertaking of Mariano, for which he was to get two hundred and eighty-four and forty-three one hundredths acres of land, which is the difference between the amount to which he was entitled as heir and the eleven hundred acres specified in the contract. This he did not do, and did not therefore swell his interest in the rancho as against José Jesus from eight hundred and fifteen and fifty-seven one hundredths acres, the amount which he took as heir, to eleven hundred acres which he claims under the contract.

If true, it is no answer to say that by force of the partition suit or the Statute of Limitations, the title of José Jesus is now made secure as against these claims, and that Mariano contributed to that end, and therefore ought to have his reward, which seems to be the substance of the theory on the part of the plaintiff. To say that the deed of the 1st of August, 1860, from Leese and wife to Mariano, which was lost and never recorded, made more than a year prior to the contract, of which, so far as this record shows, José Jesus was entirely ignorant at the time the contract was made, was the deed intended by the parties, is simply absurd, and nothing further need be said in regard to it. If José Jesus knew anything about the deed, and was moved in any respect by a desire to get any supposed title thereby vested in Mariano, he would have contracted for a deed from him directly. That a deed thereafter to be obtained was the deed for which José Jesus contracted, as understood by Mariano himself, is also shown by the subsequent demand and suit therefor by his successor, the plaintiff in this action.

[425] *The judgment and order denying a new trial are reversed, and the Court below is advised to dismiss the action.

SHAFTER, J., concurring specially:

The contract set out in the complaint does not in my opinion make the right of M. G. Vallejo to a specific performance depend upon a prior extinguishment by him of the Leese and Steinbach claims in favor of his brother. The contract, as I understand it, presents a case—at least so far

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as deed-making is concerned—of mutual promises, one promise constituting the consideration of the other, and both are to be performed at the same time. After the happening of certain events, particularly noted in the contract, the parties are "to exchange deeds." This expression excludes the idea that either party is to give or tender a deed in advance of the other, and shows that the execution of the conveyances was intended to be simultaneous. To maintain an action for specific performance, it was necessary for the plaintiff to aver that he was ready and willing, and offered to perform on his part. But that fact is neither averred nor proved.

I concur in the judgment.

LOUIS BRUCK AND WIFE *v.* REASON P. TUCKER et al.[1]

CONSTRUCTION OF WILL.—If the testator devises his "flour mill, with the land pertaining thereto, a half league, more or less," and he owns a large tract of land around the mill, and there is no inclosure around the mill, and no portion of it has any special relation to the business carried on at the mill, the entire tract of land passes by the will to the devisee, upon the death of the testator.

IDEM.—If the whole tract of land around the mill which belongs to the testator in such case is less than half a league, it will be assumed that he intended to give the whole tract.

CONFLICT OF TESTIMONY.—If the testator devises his "flour mill, with the land pertaining thereto, a half league, more or less," and several witnesses testify, some, that he applied the term "mill tract" to all the land at one time, and others, that at a different time he applied the same name to only a part of the land, it is not a case of conflict of testimony.

*RECOVERY OF LAND DEVISED.—Such testimony only shows that the testator [426] applied the name "mill tract" sometimes to a part of the land, and sometimes to all, and the devisee, to recover the land, is not obliged to prove the boundaries of the land intended to be devised.

WHAT PASSES BY WILL.—If the testator in his lifetime conveys or contracts to convey a part of a tract of land devised by him, the will, upon his death, operates only upon so much of the land as legally and equitably belonged to him at his death.

APPEAL from the District Court, Seventh Judicial District, Napa county.

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[1] Referred to in same case, 42 Cal. 349.

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This cause came on to be tried on the 3d day of Oct., 1865. The plaintiff, to maintain the issues joined on his part, proved a grant from the Mexican Government to Dr. Edward T. Bale, of the Rancho Carne Humana, and confirmation thereof, and that the claim was still pending upon exceptions to the survey; also, that juridical possession was given of the ranch. It was admitted that the land in controversy was covered by the grant and juridical possession. Plaintiff then put in evidence the will of Dr. Bale, the father of Mrs. Bruck.

The defendants were in possession of several portions of the tract of fourteen hundred and thirty-six acres, outside of the one hundred and ninety acres west of the Napa River. The defendants recovered judgment in the Court below, and the plaintiffs appealed.

The other facts are stated in the opinion of the Court.

B. S. Brooks, for Appellants.

The question was not one of identification nor of boundaries. It was a question of *construction*, of *intention*, of *interpretation*. The question was and is, what did Dr. Bale mean by the words used by him in his will, "the flour mill and all of the land, etc., which pertains to said mill, a half league, more or less?" This was for the Court to determine, and it is for this Court to determine. There are two ways that we may determine it. The first way is to interpret it in the light of surrounding circumstances, and if they are sufficient it will not be necessary to look any further. We find a segregated [427] *tract upon which the flour mill stands, containing less than half a league. It does not adjoin any other land of the testator. Is anything more necessary to enable the Court to interpret the will? Is it not manifest that this is the tract of land intended to be devised? It is for the Court, not the jury, to construe the will, and to ascertain what land the testator intended to devise. The construction and effect of a deed are matters of law, and if a jury undertake to find what effect a deed has, the Court will thus far disregard the finding and give the deed its proper effect. (Muller *v.* Shackleford, 4 Dana, 264; Venable *v.* McDonald, Id 336; Sheldon *v.* Dodge, 4 Denio, 417; Turner *v.* Gates, 16 How. 14.)

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The construction of the will, where it is to be gathered from the will alone, is a mere question of law. (Sorrel *v.* Sorrel, 5 Ala. 245; Branch Bank at Mobile *v.* Boykin, 9 Id. 320.)

C. Hartson, for Respondents.

The question of identification was one of *fact* and not of *law*, and was properly submitted to the jury. (Const. of Cal. Art. VI., sec. 17; Pr. Act, sec. 165; 1 Cal. 328; 4 Id. 69; 8 Id. 216.) The parcels in a devise always lie out of it, and must be sought by evidence *aliunde*. Their identity is a fact to be found by the jury. (Ryers *v.* Wheeler, 22 Wend. 150.) Boundaries and lines are always questions of fact for the jury. (Barclay *v.* Howell, 6 Pet. 510.) There was a conflict of testimony, and this Court will not disturb the verdict. (Peterie *v.* Bugby, 24 Cal. 422; Lubeck *v.* Bullock, 24 Cal. 338; People *v.* Brown, 27 Cal. 500.) The point in issue was the identification of the land. Appellants claimed a piece of land under a will, in which it was designated as "the flour mill and all the land, etc., which pertains to said mill, a half league, more or less." The only way of identifying the land so as to enable the jury to decide whether the defendants were upon it, and to enable the officer to find the land of which the writ should direct him to give the plaintiffs possession, was by proving its metes and bounds. *Al- [428] though it is the province of the Court to construe the written instrument, yet when the meaning is to be ascertained by the light of extraneous facts in connection with the written language, much is to left to the jury. (Gardner *v.* Clark, 17 Barb. 551; Jennings *v.* Sherwood, 8 Conn. 127.) "An admixture of parol with written evidence draws the whole to the jury." (Sidewell *v.* Roberts, 1 Penn. 386; Welsh *v.* Desar, 3 Binn. 377; Dennison *v.* Wurtz, 7 Serg. & R. 372; Moore *v.* Miller, 4 Id. 279; Watson *v.* Blaine, 12 Id. 131; Overton *v.* Tracy, 14 Id. 311; Brown *v.* Campbell, 1 Id. 176; Etting *v.* U. S. Bank, 11 Wheat. 59; 2 Phil. on Ev., C. & H.'s notes, 4th ed., p. 734, note 510; Frier *v.* Jackson, 8 Johns. 507.) "The right of the Court to decide on the legal effect of written instruments cannot be controverted, but the question of boundary is always a matter of fact for the determination of

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the jury." (Barclay *v.* Howell, 6 Pet. 508; Reynolds *v.* West, 1 Cal. 323; Hicks *v.* Davis, 4 Id. 69.)

By the Court, SHAFTER, J.:

Ejectment for land situate in the county of Napa.

Mrs Bruck made title to the demanded premises, as devisee of her father—who held by grant from the Mexican Government.

The devise was as follows: "To my daughter Lolita [Mrs. Bruck] the flour mill with the land pertaining thereto, a half league, more or less." The will was made in 1849.

It appeared in evidence that the grant to the testator was of land situate in Napa Valley, and that the Napa River runs through the grant from north to south. That the testator, some years before his death, conveyed a piece off the northerly end of the grant to one Kilburn, and another piece, toward the southerly end, to one Kellogg—leaving a section, intermediate the two parcels, lying on both sides of the river, and extending to the eastern and western boundaries of the grant. This section contained one thousand four hun-
[429] dred and *thirty-six acres. It further appeared that the flour mill, forming in part the subject-matter of the devise, was situated on this section, and on that part of it lying to the west of the river, which part contained one hundred and ninety acres only. It further appeared that there was no inclosure around the mill, either near or remote. It stood in the open country. There was no evidence tending to prove that any of the lands lying between the mill, taken as a centre, and the exterior limits of the unsold section described, had any special relations to the business carried on at the mill.

First—That the mill devised was the flour mill referred to, is not disputed. The testator owned no other; and as there was no evidence tending to establish any connection between the mill and any land outside of the section named, it must be understood that the testator, in the use of the word "pertains," referred to the land belonging to him lying between the walls of the mill and the outer limits of the unsold section on which the mill stood. This follows of necessity. No

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part of that section bore any relation to the mill that was not borne, both in kind and degree, by every other part of it. The only relations which the different portions of the section beyond the walls of the mill bore to each other, lay in the fact that they were parts of a common whole; and the relation so existing between them—*inter sese*—was the relation that existed between them in mass and that particular part of the section on which the mill stood. The principle is this: If the central or any other section of an entire and homogeneous thing be either devised or granted, together with "all" the other sections "pertaining" thereto, the entire thing would pass, as matter of law. In such case, the whole thing would be granted by a virtual enumeration of its parts.

Second—But the question is presented in the record under another aspect. The case was tried upon the theory that the lands "pertaining to the mill" were, according to the intention of the testator, the lands which were known to him, and through him to others, as the "mill tract." The evidence of the plaintiffs tended to prove that the testator, in many *instances, both before and after the making of the [430] will, designated the whole of the unsold section as the "mill tract," while the defendants' testimony tended to prove that the testator, on other and different occasions, had applied the name to that part of the unsold section lying on the west bank of the river. There was obviously no conflict in this testimony; that is, the witnesses of the plaintiffs were not contradicted in any respect by the witnesses of the defendants. The plaintiffs' witnesses testified to one set of utterances, and the defendants' witnesses to another. It was error, therefore, for the Court to instruct the jury upon the hypothesis that the testimony was in conflict—submitting the question to them of whether the larger or the smaller area was intended to be devised as one of "preponderance," turning upon the relative weight of proofs assumed to be conflicting. The true instructions would have been that the tendency of all the evidence was to prove that the testator applied the name of "mill tract" to both the larger and the smaller quantity indifferently, and that if the jury found that such was his practice in fact, and found further that the whole of the

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unsold section contained but fourteen hundred and thirty-six acres, and that that part lying to the west of the river contained but one hundred and ninety acres, then their verdict should be for the plaintiffs. The case was not one of admitted or proved discrepancy between metes and bounds visible in the field, and quantity considered as a call. The question was, primarily, as to the application of a name. The name, however it may have been a clue to boundaries, was not a bound in itself considered. Had it been made to appear that the testator applied the name to but one parcel of land, then whether the parcel contained more or less than a half league would have been a matter of indifference. But taking it as found or given, that the testator applied the name sometimes to the whole of the unsold section and sometimes to a part of it, it would be impossible for either Court or jury to determine on that state of facts alone, in which of its two scopes the testator used the name when he came to make his will.

The problem thus raised by one of the extrinsic facts [431] is, *however, fully solved by another when taken in connection with that call of the will in which the land intended to be devised is described as a "half league, more or less." It must be assumed that the testator intended to give the whole section; for though its area was less than a half league, it was nevertheless a nearer approximation to that quantity than the smaller area to which the testator had occasionally applied the common name. In so holding we do not subordinate a territorial name, the precise dimensions of which have been ascertained, to a call for quantity, but use that call as an aid in finding bounds as yet unknown. In this case, quantity is as a guide-board standing where a road divides, showing to the traveller which fork he must take to reach his place of destination.

Third—The Court told the jury that "the plaintiffs could not recover unless they established the lines and boundaries of the land devised with as much certainty as though they were contained in the deed." The charge was given upon the mistaken hypothesis before remarked upon, viz., that the witnesses contradicted each other, and the instruction was therefore properly excepted to by the plaintiffs.

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Judgment reversed, and new trial ordered.

By the Court, SHAFTER, J., on petition for rehearing.

In the opinion delivered in this action, we do not hold that any part of the mill tract passed to the devisee which the devisor conveyed or contracted to convey in his lifetime. The will of course operated only upon so much of the mill tract as legally and equitably belonged to Dr. Bale at the time of his death.

Rehearing denied.

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*THE PEOPLE v. GOLDSTEIN. [432]

FORMER CONVICTION, PLEA OF.—If a defendant in a criminal case when arraigned pleads guilty, and his plea is entered of record by the Court, he is convicted of the crime without a trial, and this conviction is a good defence upon a plea of a former conviction if he is again indicted for the same offence, although no judgment was pronounced by the Court upon the plea of guilty.

APPEAL from the County Court, Los Angeles county.

The defendant was convicted upon the second trial and sentenced by the Court, and appealed from the judgment.

The other facts are stated in the opinion of the Court.

E. J. C. Kewen, for Appellant.

Attorney-General, for the People.

By the Court, SANDERSON, J.:

The defendant was indicted for grand larceny jointly with one Coleman. He pleaded guilty, and his plea was entered of record, and a time appointed for pronouncing judgment. Coleman pleaded not guilty, and a jury was called. At the trial, it appeared that the stolen property belonged to five persons, only four of whom were named in the indictment. The District Attorney and the Court were of the opinion that the variance was fatal, and accordingly the indictment was quashed and the jury discharged. Upon the motion of the

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District Attorney, the case was referred back to the grand jury, which found another indictment against both Goldstein and Coleman. No judgment was pronounced upon Goldstein's plea of guilty at the time appointed, nor has there been up to the present time; but he was arraigned upon the second indictment, to which he pleaded a former conviction and not guilty. Upon the trial of the first plea, he offered in evidence the proceedings against him under the first indictment.

The Court charged the jury as follows: "1st—A plea of guilty is not conviction. 2d—A party cannot be convicted of a crime except by the verdict of a jury, or his confes-
[433] sion, and *a judgment of the Court thereon. 3d—A dismissal of a case after the plea of guilty, and a submission of the case to another grand jury, is not a former conviction for the same crime. 4th—The fact that a former indictment is still pending, if proved, would not sustain the plea of a former conviction." To this charge the defendant excepted.

Where a defendant pleads guilty, and his plea is entered of record as provided in the Criminal Practice Act, (sec. 300,) he stands convicted in the eye of the law as fully as he would have been by a verdict of guilty. He is convicted by his plea, and there is, therefore, no occasion for a trial, and nothing remains to be done except to pronounce judgment. On the question of former conviction there can be no distinction between a plea and a verdict of guilty, for both are followed by the same consequences.

Nor is it necessary that a judgment should have been pronounced upon the conviction to make the plea of former conviction good. (1 Bish. on Cr. Pro., sec. 581; State v. Elden, 41 Me. 165.)

Judgment reversed.

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THE PEOPLE v. MICHAEL G. LACHANAIS.

RATIONAL DOUBT.—When the testimony on a trial for murder is entirely circumstantial, and there is nothing which connects the defendant directly with the homicide, the defendant, if he desires it, is entitled to a full and clear instruction as to what the law means by a rational doubt.

[1] INSTRUCTIONS IN CRIMINAL CASE.—The better course is for the Court never to refuse an instruction asked on behalf of a defendant in a criminal case, to which there is no valid objection, although the jury may have been already fully instructed on the point. A District Attorney ought never to object to such instructions.

APPEAL from the District Court, First Judicial District, Los Angeles county.

The defendant was indicted for the murder of Pablo Moreno, *at Los Angeles county, on the 22d day of [434] October, 1866. The Court below instructed the jury as follows:

"The defendant may be convicted on circumstantial evidence, if the jury believe from the proof that such evidence is inconsistent with his innocence and leaves no rational doubt of his guilt.

"Doubts must be reasonable. A juror has no right to disbelieve the evidence as a juror while he believes it as a man.

"If the jury have any reasonable doubts as to the guilt of the defendant, they will acquit."

The attorney for the defendant asked the following instructions, which were refused:

"The accused is entitled to the benefit of all reasonable doubts which, after careful consideration, may be found in your minds, as well as to the sufficiency of the proof of any and all alleged facts necessary to constitute either of the offences of which he may be convicted under the indictment, as also whether he is guilty of any of them. Before conviction, the persuasion of guilt produced by the evidence ought to amount to almost certainty, or such a moral certainty as

[1] Cited, State v. Ferguson, 9 Nev. 118.

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convinces the minds of the jnry as reasonable men. You must understand, however, that what is meant by a reasonable doubt is not a mere possible doubt, since it should not be overlooked that everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed innocent until proved guilty."

The defendant was convicted of manslaughter, and
[435] *sentenced to imprisonment for the term of three years, and appealed from the judgment.

The other facts are stated in the opinion of the Court.

Kewen & Howard, for Appellant.

Attorney-General, for the People.

By the Court, SANDERSON, J.:

The testimony is entirely circumstantial. We have read it carefully, and find nothing which directly connects the defendant with the homicide, assuming that one was committed. Where such are the conditions, it is of vital importance to the defendant that the jury should be instructed fully and clearly upon the question of reasonable doubt; for the evidence must not only be consistent with the guilt of the defendant, but inconsistent with every other rational conclusion. (People *v.* Strong, 30 Cal. 154.) It is true that the Court, in a general way, at the request of the District Attorney, instructed the jury that they must be convinced of the guilt of the defendant beyond a reasonable doubt, or acquit; but nothing was said as to what the law means by a rational doubt. The defendant, if he so desired, was entitled to a full and clear instruction upon that subject, both as to the fact of homicide and the participation of the defendant. His counsel prepared one which, so far as we can discover, is not only

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without any substantial objection, but is not even obnoxious to criticism. It seems to have been prepared with unusual care and precision. It was nevertheless refused. The Attorney-General concedes that it is sound and that it would have been better to have given it, but claims that the law upon the subject is sufficiently stated in the instructions which were given. We do not think so. We have held that it was not error to refuse to give an instruction, though unobjectionable in all respects, where the jury have been already instructed fully upon the point to which the instruction is directed; but we have done so with reluctance, and we have repeatedly *suggested that the Court in such cases ought to give [436] the instruction and not take the chances of this Court looking at the matter in the same light. (People v. King, 27 Cal. 515; People v. Williams, ante 280.) Suppose the result to be that the law is twice stated, it does no harm. No harm would be done if it was stated three times. On the contrary, it might in many cases result in good. What appears plain and easy of comprehension to bench and bar does not always appear so to those who occupy the jury box. It would be strange if it did. The better and safer course is for the Court never to refuse an instruction asked on behalf of a defendant in a criminal case, to which there is no valid objection, and District Attorneys ought never to object to such instructions. It is their duty to prosecute the case to the best of their ability, but it is not their duty to oppose in any manner a full and fair defence. To do so is not to prosecute, but to persecute, and the latter is no part of their duty.

Judgment reversed, and a new trial ordered.

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KATIE KETLER KIDWELL *v.* JOHN W. BRUMMAGIM, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF JACOB C. BEIDEMAN, DECEASED.

ADMINISTRATOR WITH WILL ANNEXED. — If the testator appoints an executor of his will, and the executor dies, and an administrator with the will annexed is appointed, the administrator with the will annexed, under the statutes of California, possesses all the power conferred on the executor named in the will, and can sell the land devised if the executor could have sold it.

POWER TO SELL GIVEN IN A WILL. — When the testator in his will directs his executor, within one year after his decease, to sell his real estate, the proceeds to be disposed of upon certain trusts, the power to sell is not limited to one year, but may be exercised after that time, unless there are express words in the will showing the intention of the testator to thus limit the exercise of the power.

APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

The facts are stated in the opinion of the Court.

[437] **J. B. Felton*, for Appellant.

Thompson Campbell, for Respondent.

1st. Did the power to sell pass to the administrator? Under our laws, the executor or administrator takes by operation of law an interest in the real estate of the testator, growing out of the right to its possession, and because he is invested with the rents and profits of the land. His authority to sell is a power coupled with an interest, and survives. (Bergen *v.* Bennett, Caine's Cas. 16; Prob. Act, secs. 114, 178, 194, and 195; Steele *v.* Moxley, 9 Dana, 139.)

2d. Does the power to sell now exist? The answer to this turns upon the question, whether the power to sell is coupled with other trusts created by the will? It will be seen by an examination of the will that the trusts created by the testator grow out of and depend upon the execution of the power to sell. The power to sell is therefore not a mere naked power, but is coupled with specific trusts, and which are in all respects subordinate to the power itself. Where the power to sell is coupled with other trusts and duties, and duties which require the execution of such power, the survivor may

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lawfully execute the power. (Franklin *v.* Osgood, 14 John. 553; Jackson *v.* Ferris, 15 John. 347; 3 Binn. 73.) The question of time would seem to be material only in cases of mere naked powers; but when the power is coupled with an interest or a trust, then such trust is not made subordinate to the time, but merely to the power, unless the nature of the interest or trust be such as to make time a material part of the power to sell, and which is not the case in the present instance. It is a familiar rule of construction that many requirements of law may be regarded as directory. Lord Mansfield remarks: "That there is a *known distinction* between circumstances which are the *essence* of the thing required to be done by an act of Parliament, and clauses merely directory." (1 Burr. 447.) The same rule of *construction which Courts apply to the acts of public [438] officers, it is submitted, is applicable to the acts of a trustee, where it appears that the designation of time within which he is directed to perform some particular act is not of the *essence* of the power, but which may, for satisfactory reasons, be disregarded. In all such cases the act is valid if done afterwards.

By the Court, SAWYER, J.:

Jacob C. Beideman, a resident of San Francisco, died on the 8th of July, 1865, seized of a large amount of real estate in the city and county of San Francisco. He left a will bearing date the 26th day of January, 1863, in which it is provided as follows: "First—The executor of this my last will and testament will, within one year after my decease, sell at public auction, in proper subdivisions, at said city and county, after giving two months' notice of such sale, all the real estate I shall own, be seized, possessed of, or interested in at the time of my decease, etc.; * * * and from the proceeds of such sale the said executor will pay the expenses of my last sickness, the expenses of my funeral, and all my just debts. * * * Second—I give and bequeath and devise to Henry F. Williams, of the said city and county of San Francisco, twenty thousand dollars in money, proceeds of the sale above provided for, remaining after the said expenses and my just debts are paid;

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in trust, however, for the following purposes and none other or different—that is to say," etc., specifying the purposes. He then gives twenty thousand dollars more, "proceeds of the sale above provided for," to said Williams, "in trust" for other uses specified; then various other sums, in trust for sundry other purposes; then: "Ninth—And from the proceeds of the sale of my property, remaining after all the above gifts, devises, and bequests are fully provided for, I make the following gifts, devises, and bequests: that is to say"—specifying a large number of bequests, many of which are to various public and charitable institutions. After which, he disposes of the residue to other designated parties [439] upon *specified trusts, and appoints Samuel H. Parker sole executor. The dispositions of the will are wholly different from those provided by the Statute of Descents and Distributions. On the 29th of July, 1865, letters testamentary issued to said Parker. On the 14th of March, 1866, after entering upon his duties as executor, and within a year after the death of the testator, said Parker died. On the 30th of April. 1866, letters of administration, with the will of said Beideman, deceased, annexed, were issued to Wm. R. Satterlee and defendant Brummagim. On the 9th of December, 1866, said Wm. R. Satterlee died, leaving defendant Brummagim sole surviving administrator with the will annexed. One year after the death of said Beideman expired on the 8th of July, 1866. The defendant Brummagim, as administrator with the will annexed of said Beideman, after the expiration of the year, was proceeding to sell the real estate of the testator in pursuance of the direction to the executor contained in the first clause of the said will. The plaintiff, a niece of the testator, and one of the devisees, and a *cestui que trust* mentioned in the will, applied for an injunction to restrain the sale, on the ground that the defendant had no power to sell, and that a sale would cloud the title to the real estate, diminish the value, and involve her in litigation and loss. The District Court entered an order refusing to grant an injunction, and plaintiff appeals from the order.

But two questions are presented by the parties for our decision.

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Firstly—Did the power to sell, as set forth in the will, pass to the administrator with the will annexed? And if so,

Secondly—Was the power to sell limited to one year after the death of the testator, or does it still exist, notwithstanding the expiration of the year?

As to the first question, the power was not merely personal. It was not conferred upon Samuel H. Parker in his individual character; it was given to the executor as such; it was given *virtute officii*. In Jackson *v.* Ferris, 15 John. 345, the provision of the will is: "I will and order that all my just debts *and funeral charges be paid by my executors, [440] hereinafter named, out of my personal estate. If there should not be enough of my personal estate, I will and order some of my real estate to be sold to pay my debts." The Court say: "The testator, in the case before us, gives the power to sell to his executors without naming them, which shows that the authority intended to be given was *virtute officii*, and it being a power to sell for the purpose of paying debts, the exercise of it was necessary to effectuate his intention." (Id. 347.)

In this case the executor is not named in the clause at all. It is: "the executor of this, my last will and testament, will, within one year after my decease, sell at public auction," etc. It is clearly given *virtute officii*. This is not a mere naked power, but a power coupled with various trusts, which could only be carried out through an execution of the power. The power, therefore, did not die with the party who was named executor in the will, if there is any other mode provided by law for executing the power, notwithstanding the death of the party named as executor. In Franklin *v.* Osgood, 14 John. 553, Mr. Justice Platt says: "There is also another class of cases which clearly show that where the terms made use of in creating the power detached from the other parts of the will confer merely a naked power to sell; and yet the other provisions of the will evince a design in the testator that at all events the lands are to be sold, in order to satisfy the whole intent of the will, then, also, the power survives. In this latter case it is not a naked power, in the sense of Lork Coke's general rule, but is coupled with other trusts and duties which

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require the execution of the power to sell. (Barnes' Case, Sir Wm. Jones, 352; Cro. Car. 382; Pow. on Dev. 297, 307; Hard. Ky. 419; Cro. Ch. 382; Cro. Eliz. 26; Sug. on Pow. 141.)" Zebach *v.* Smith, 3 Bin. 69, is to the same effect. In this case it is clearly manifest from the other provisions of the will that there are trusts depending upon the execution of the power. The power was not the principal thing. The objects of the will are expressed in the various trusts and dispositions made of the proceeds of the sales of the property of the [441] *testator, and the power to sell was only given in aid of the trusts, and to enable them to be carried out. The power was clearly designed to be wholly subsidiary to the trust.

Section forty-two of the Probate Act provides that, "When all the persons named as executors are incompetent, or shall renounce or fail to apply for letters, or to appear and qualify, letters of administration, with the will annexed, shall be issued." Section forty-eight provides, that "Administrators with the will annexed shall have the same authority as the executor named in the will would have had, and their acts shall be as effectual for every purpose." Section ninety-seven provides that, in case the executors shall die or the powers be revoked, the Probate Court shall also issue letters of administration with the will annexed, and "the administrator so appointed shall give bond in like penalty with like sureties and conditions as hereinbefore required of administrators, and shall have the like power and authority." And section one hundred seventy-eight provides: "When * * * any property directed by the will to be sold, whether for payment of debts or expenses, or for any other purpose, the executor or administrator with the will annexed may proceed to sell without the order of the Probate Court," etc., and when there are special directions in the will he is to be "governed by such directions." The statute, then, in express terms, provides a mode of executing the will of the testator in case of the death or failure to act, or other disability of the executor named in the will. These provisions were in force at the time of the making of the will in question, and were a part of the law in view of which the will must have been executed.

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The testator is presumed to have understood that in case of the decease of the party named as executor without any other provision in the will supplying his place, the Probate Court would be authorized to appoint an administrator with the will annexed, who would be thereby invested with all the powers of the executor named in the will, subject only to such special supervision and limitations as were *imposed [442] by the statute itself. The effect is the same as if the testator had incorporated these provisions in express terms into the will. An administrator with the will annexed having been duly appointed, we think, under the statute, he is invested with all the powers conferred on the executor named in the will, except so far as there are express limitations put upon those powers, and that he can sell if the executor himself, if alive, could sell. In Kentucky, it is held that a power to sell lands given by a will to executors devolves, by operation of law, upon an administrator with the will annexed. (Peebles v. Watts, 9 Dana, 103.) There seems to be a statute upon the subject in that State similar to our own. (Steele v. Moxley, 9 Dana, 139.)

As to the second question, upon a consideration of the entire will, we entertain no doubt that the testator did not intend to limit the exercise of the power to the period of one year after his decease. He directs the property to be sold within one year, but the provision is directory merely. As before shown, the power is coupled with, and subsidiary to, certain express trusts, and is given as the means, and only means, of carrying out those trusts. The testator determines the objects upon which his bounty shall fall, and the mode by which his wishes shall be carried out. He nowhere indicates any contingency upon which his property, or the proceeds of the property, shall be diverted from the objects specified, or upon which the trusts shall fail. He declared his purpose that the property should be sold, and the proceeds disposed of upon certain trusts for the benefit of certain specified parties and charities. These were the principal objects to be accomplished—the essentials of the will: the rest related to the mode of accomplishment. True, he directs the sale to take place within a year, but time is not of the essence of the thing to be

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done, or of the power. He was, doubtless, desirous that the beneficiaries should, at the earliest practicable period, enter upon the enjoyment of his bounty—hence the direction. [443] To give the will any other *construction might defeat the trusts and disappoint the intentions of the testator, as clearly manifest from a view of the entire will. It would put it in the power of the executor by wilful neglect, or of parties interested, by obstructing the sale by legal proceedings, to defeat the will of the testator. Or other circumstances might occasion the same result. Miller *v.* Meetch, 8 Pa. St. 419, is in point. A sale was made by one of the executors—one having died and one renounced—several years after the death of the testator, under the following clause in the will: "I will that my executors, on or before the 1st of April next ensuing, sell either at public or private sale, as they may judge proper, all my estate, real and personal," etc. The validity of the sale was in question in an action of ejectment. On the point the Court say: "Another objection urged against the validity of the sale as an execution of the power is, that it was not made within the time contemplated by the testator. But this is equally destitute of merit with the other objections. It is true that equity will never aid the non-execution of a mere naked power, which it is optional with the party to execute or not. These powers are never imperative; they leave the act to be done at the will of the party to whom they are given. But trusts are always imperative; and if it is to be effected by the execution of a power, equity will never suffer it to fail from the negligence of the trustee, but will compel him to execute it. (16 Ves. Jr. 26.) An instance of this is where a power is given by a will to trustees to sell an estate and apply the money on trusts. (2 Sug. on Pow. 174.) So where, as in this instance, the proceeds of the sale are to be distributed in a particular way. Though in such cases a direction is given for the execution of the power within a limited period, it may be exercised after the lapse of that period, for time does not enter into and make a part of the power. Where the principal intent is to confer a benefit on *cestui que trusts*, a non-execution of the power within the time limited shall not be suffered to defeat it. The execution

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of a power to sell after the time directed is not like an attempted execution before *the time prescribed, as [444] was the case in Loomis v. McClintock, 10 Watts, 74. In the latter case, the act of the party is void, for, until the time arrives for its execution, the power has no existence; but after it has sprung into life, when it is coupled with a trust or interest, it continues to exist until exercised." A similar question arose in Daly v. James, 8 Wheat. 531, where the direction was, in a certain event, to sell "within two years after the decease" of the testator's son. It was held by a divided Court that the devise of the proceeds to be derived from the sale failed to take effect in consequence of the death of the devisees in the lifetime of the son, so that the contingencies upon which the power to sell depended never arose. After determining this point upon a full discussion, it is very briefly added that, whether the conclusion attained is correct or not, the sale was limited to two years after the decease of the son. The little said in support of the latter conclusion is very unsatisfactory, and, to our minds, is conclusively and satisfactorily answered by Mr. Justice Johnson in a clear and able dissenting opinion. (Ib. 539.) The view maintained in the dissenting opinion was adopted in the much later case before cited from the State of Pennsylvania. The only other case brought to our notice supposed to bear directly on this point is Richardson v. Sharp, 29 Barb. 228. But the circumstances upon which the Court seems to have particularly rested its decision in that case are special, and the case affords no aid.

We are satisfied, upon a view of the entire will and the reasoning of Mr. Justice Johnson in Daly v. James, 8 Wheat. 539, and the Court in Miller v. Meetch, 8 Pa. St. 424, that it was not the intention of the testator to limit the sale to one year after his decease, and that the power to sell still continues.

The order refusing an injunction is therefore affirmed.

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[445] *THE PEOPLE v. S. D. HIDDEN.

EXCUSING GRAND JURORS.—The Judge excused persons summoned as grand jurors and in attendance, without requiring them to appear and make their excuses under oath in open Court: *Held*, no error.

[1] OBJECTION TO GRAND JURY.—If a defendant in a criminal case has an opportunity given him to interpose a challenge to the grand jury and to the individuals of such jury, before the indictment is found, but makes no challenge, he cannot afterwards take advantage of any objection to the panel or to an individual grand juror.

APPEAL from the County Court, Santa Clara county.

The facts are stated in the opinion of the Court.

Attorney-General, for the People.

Senter & Hunt, for Respondent.

By the Court, CURREY, C. J.:

The grand jury drawn and summoned at the January term, 1867, of the County Court of Santa Clara county, in the mode provided by law, appeared, and being called, certain of the number so summoned were excused for causes which at the time seemed sufficient to the Court; after which, the remainder of the persons so drawn and summoned were called, and the first fifteen who answered were sworn as a grand jury. At the time the grand jury was thus constituted, the defendant and one William Spear were in custody, charged with having committed a felony, for which they were held to answer, and they were brought into Court and asked by the Judge if they had any objections to make to any of the fifteen persons who had been drawn to form a grand jury; whereupon they answered that they had "no objections to any of said persons acting as grand jurors, nor to the panel of grand jurors." The Court then appointed one of the jurors foreman, and instructed them. The grand jury then retired in charge of a sworn officer, to deliberate upon the matters to be brought before them. While in session, this grand jury found and returned an indictment against the defendant accusing him of

[1] Approved, People v. Stacey, 34 Cal. 308. Cited, People v. Millsaps, 35 Cal. 48.

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*the crime of assault with a deadly weapon upon José [446]
Miguel Martinez with intent to murder him. Upon being arraigned, the defendant moved the Court to discharge him from custody on the grounds—first, that the grand jury had formed and expressed an opinion before the finding of the indictment adversely to the defendant; secondly—that no opportunity was offered to him, after his arrest and before the indictment was found, to except to the panel of grand jurors, nor to the individual jurors who found the indictment. By stipulation between the District Attorney and the defendant's counsel, the latter had leave to introduce affidavits in support of the motion. Whether any affidavits were introduced or not, the record does not inform us; but it appears that upon the parties thus stipulating, the attorneys for the respective parties argued and submitted the motion; and then the defendant was arraigned, which the stipulation provided should be without prejudice to his motion, and thereupon he pleaded not guilty. After this was done the jurors were brought into Court and informed by the Judge that they had no power or authority to act, because of irregularities which had occurred in excusing persons from serving as grand jurors, and thereupon "the Court, upon its own motion," discharged them from further attendance, and ordered that the defendant be held to await "the further action of the next grand jury." The Court, on motion of the defendant's counsel, rendered judgment setting aside and dismissing the indictment. To these rulings and judgment of the Court the District Attorney excepted, and in due time appealed.

The grand jurors were drawn and summoned, it would seem from the showing of the record, as required by the statute. (Laws 1863, p. 630.) Some of the persons who appeared in answer to summons were excused for causes which seemed to the Court at the time to be good and valid, and the objection which the Judge took to his own action in the premises was not that the grounds upon which he excused such persons were not sufficient, but that he did not require them to appear and make their excuses under oath in open Court. In answer *to this objection it is enough to say that the [447]
statute does not require this, though the practice re-

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quiring excuses in such cases to be supported by evidence in some accredited form is to be commended.

The defendant had the opportunity afforded him to interpose a challenge to the grand jury and to the individuals of such jury before the indictment was found. (Chap. 2 of Title 4 of Cr. Pr. Act, Hitt. Gen. Laws, 1768, *et seq.*) He made no challenge, but declared he had neither objection to the panel nor to any individual juror. The one hundred and eighty-ninth section of the act declares that "a person held to answer to a charge for a public offence can take advantage of any objection to the panel or to an individual grand juror in no other mode than by challenge as prescribed in the preceding sections" of said act. It is thus seen that the grounds on which the defendant's motion was founded had no existence in fact.

The judgment setting aside and dismissing the indictment is reversed, and the cause remanded.

MARY ANN ELLIS *v.* THOMAS EASTMAN, JAMES BUCKLEY, ROBERT HAMILTON, JOHN SMITH, HANS SCHMIDT, AND JENLOFF SMITOUSKI.

PRIVATE ACT.—An act of the Legislature confirming sales of land before then made by a Board of Fund Commissioners, which sales conveyed no title for want of power in the Board, is a private statute of which the Courts will not take notice as evidence of title unless offered in evidence.

PRIVATE ACT MUST BE OFFERED IN EVIDENCE.—Courts will not take judicial notice of a private act unless offered in evidence.

COMMISSIONERS OF SINKING FUND IN SAN FRANCISCO.—The sales of land made by the Commissioners of the Sinking Fund of San Francisco on the 25th day of January, 1851, were void for want of power in the Commissioners.

APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

Ejectment for a lot of land in San Francisco, on the northeast corner of Larkin and Filbert streets, known on the
[448] map *of the city as fifty vara lot number seven hundred and eighty-two.

On the trial, plaintiff introduced in evidence a deed of the

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Commissioners of the Sinking Fund of San Francisco to E. P. Buckley, dated February 27th, 1851, purporting to convey the demanded premises to said Buckley. The defendants objected to its introduction, because the Commissioners had no power to convey. Plaintiff then proved a deraignment of title from said Buckley to her. Plaintiff then introduced evidence tending to prove possession in her grantors before the entry of defendants. Defendants were in the possession of separate parcels of the lot.

The cause was tried on the 11th day of August, 1865, and it was admitted on the trial that the lot was within the four leagues of land which, during the year last past, had been confirmed to the city of San Francisco.

The Common Council of San Francisco, on the 23d day of August, 1850, passed an ordinance creating five Commissioners of the Sinking Fund, with power to sell all the real estate of the city, to provide funds for the redemption of the city debt. On the 23d of December following, another ordinance was passed, requiring the Presidents of the two Boards of Aldermen to execute a deed of trust of the land belonging to the city to the said Commissioners. The deed was executed December 25th, 1850. In 1851, the Commissioners executed the deed offered in evidence.

The Supreme Court held, in the 2d and 15th of Cal. mentioned in the opinion, that the Common Council had no power to pass the ordinance.

In 1858, (Stat. 1858, p. 84,) the Legislature passed an act in general terms confirming and legalizing all sales at auction made *bona fide* by the Commissioners. The act did not name any particular lot.

The plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

**Porter & Holladay*, for Appellants. [449]

B. S. Brooks, for Respondent.

By the Court, SANDERSON, J.:

We think that counsel upon both sides misapprehend the

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true relation which the act of the 25th of March (Stat. 1858, p. 84) bears to the case. That act is not a public act, of which Courts are bound to take notice, but a private statute, which the plaintiff, if she wished to found her title upon it, was bound to offer in evidence.'

The deed from the Commissioners of the Sinking Fund conveyed no title to Buckley, for they had no title to convey. (Smith *v.* Morse, 2 Cal. 524; Heydenfeldt *v.* Hitchcock, 15 Id. 514; People ex rel. The Board of State Harbor Commissioners *v.* The Broadway Wharf Company, 31 Id. 33.) If anything passed to Buckley it was by virtue of the act of the 25th of March, 1858, confirming the sale and deed of the Commissioners of the Sinking Fund. Hence that act is the foundation of the plaintiff's title and performs precisely the same office which the deed of the Commissioners would have performed without it, had they, at the time, been vested with the title. Its relation to the case is therefore that of evidence and not that of a public act of the Legislature; and not having been introduced in evidence, the Court below should have disregarded it for all the purposes of the trial.

It is claimed on the part of the respondent that there is nothing in the record which shows that the Court below founded its decision in any respect upon the act; but we think we are fully sustained by the record in holding that the Court attached much importance to it, if it was not, in fact, which is more than probable, made the turning point. In any event, it is quite clear that the case was not tried upon the true theory, and that the ends of justice will be subserved by a new trial.

Judgment reversed, and a new trial ordered.

434

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*MARIE VIGNES DE RACOUILLAT, ETIENE L. RACOUILLAT, ELIZABETH VIGNES, AND JEANNE VIGNES SIGNE *v.* JOHN E. RENE, PIERRE SANSEVAIN, JEAN LOUIS SANSEVAIN, JEAN VIGNES, AND MANUEL REQUENA, EXECUTOR OF THE ESTATE OF J. L. VIGNES, DECEASED. [450]

RECORDING MORTGAGE.—A mortgage not executed under seal is not entitled to record.

NOTICE OF MORTGAGE NOT UNDER SEAL.—The record of a mortgage not under seal does not give constructive notice of its contents, and a subsequent purchaser, unless he has actual notice of such mortgage, is not affected by it.

REVIEW OF FINDINGS OF FACT.—Findings of fact cannot be reviewed by the appellate Court on an appeal from a judgment.

DENIAL OF AN ALLEGATION OF COMPLAINT.—In order to determine whether the denials of an answer are evasive, each separate denial of each separate allegation must be taken by itself. If the answer to a particular allegation is a denial of it, and there is no admission in the answer inconsistent with this denial, an issue is fairly made.

IDEM.—Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation.

[1] PLEADING EVIDENCE.—Evidence should not be alleged in a complaint. Averments of mere evidence are not admitted by failure to deny them in the answer.

WHAT ALLEGATIONS MUST BE DENIED.—The defendant in his answer is required to deny only the material allegations of the complaint.

TREATING AN ALLEGATION OF A COMPLAINT AS DENIED.—If the plaintiff on the trial treats an allegation of the complaint as denied in the answer, and introduces evidence to prove it, he will not be permitted after the issue is found against him to raise the point for the first time in the Supreme Court that such allegation is not denied.

[2] COVENANT IN MORTGAGE.—A covenant of the mortgagor inserted in the mortgage, to "pay and discharge all legal mortgages and incumbrances of whatever nature and description" on the premises mortgaged, does not put a purchaser from the mortgagor upon inquiry as to any mortgages or incumbrances not of record. A purchaser from the covenanter cannot be charged with constructive notice of a recorded mortgage not under seal.

APPEAL from the District Court, First Judicial District, Los Angeles county.

The plaintiffs and the defendant Jean Vignes were the children of Jean Louis Vignes and Jeanne S. Vignes. Their said father and mother were natives of France. Their father

[1] Cited, Wormouth *v.* Hatch, 33 Cal. 128; Jones *v.* Petaluma, 36 Cal. 233; Minor *v.* Kidder, 43 Cal. 236.

[2] Cited, Lamb *v.* Davenport, 1 Saw. 631.

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emigrated to Los Angeles, California, about the year 1827, but their mother remained in France, where she died [451] in 1843. *The said Jean Louis Vignes, after he came to California, but before the death of his said wife, acquired a tract of land in Los Angeles, called "Aliso," and the plaintiffs claimed to be entitled to one-half of the same as heirs of their said mother. The plaintiffs and defendant Jean Vignes, and their said father, for the purpose of settling this claim, on the 13th of March, 1851, entered into a written contract, by the terms of which the children were to receive three thousand dollars each, and the further sum of five thousand five hundred dollars each, either after or before their father's death, as he might consider proper. This contract provided that the sum total should be secured by the property called "Aliso." It was not under seal, but was acknowledged on the day of its date, and recorded in the office of the Recorder of Los Angeles county. The plaintiffs claimed that this instrument was a mortgage. The said Jean L. Vignes died at Los Angeles, January 17th, 1862, and the defendant, Manuel Requena, was his executor. The said Jean L. Vignes, before his death, and on the 3d day of April, 1855, sold the "Aliso" to the defendants, Pierre and Jean Louis Sansevain, for the consideration of forty thousand dollars, and to secure a part of the purchase money they executed to him a mortgage on the same. This mortgage contained a covenant that the mortgagors would "pay and discharge all legal mortgages and incumbrances of whatever nature and description upon the aforementioned and described property, at and previous to the present date, whenever the same shall become due." At the time of the execution of the mortgage by the Sansevains, there was existing and duly recorded, a mortgage on the same property, before then made by the said Jean Louis Vignes to Tobi & Schlessinger, given to secure the payment of the sum of three thousand dollars. The defendants Sansevains, on the 5th day of April, 1863, conveyed the said "Aliso" to the defendant, Rene, for the consideration of thirty-one thousand eight hundred dollars, and his deed was then duly recorded in the Recorder's office of Los Angeles county. This action was commenced on the 24th day of March, 1863,

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for the purpose of having the *instrument of March [452] 13th, 1851, declared a mortgage, and of having the same foreclosed, and to recover judgment against the Sansevains, and Requena, the executor, for the amount due on the instrument. The defendant, Jean Vignes, declined to become a party plaintiff, and was therefore made a defendant. The Court below gave judgment that the plaintiffs each recover from the defendants, Pierre and Jean Louis Sansevain, and the executor, the sum of five thousand five hundred dollars, with legal interest from January 17th, 1862, and that the plaintiffs take and recover nothing from the defendant Rene.

The plaintiffs appealed from that part of the judgment in favor of the defendant Rene.

The other facts are stated in the opinion of the Court.

[A decision on an appeal of the defendants, Pierre and Jean Louis Sansevain, and Requena, the executor, from that part of the judgment against them, is reported ante 376.]

V. E. Howard, for Appellants.

Baldwin & Felton, for Respondent.

By the Court, SAWYER, J.:

This is an appeal by plaintiffs from a judgment in favor of Rene, in an action to foreclose certain mortgages wherein Rene was made a party as a subsequent purchaser. Whether we regard the suit as an action to enforce a lien under the instrument dated April 13, 1851, claimed to have been executed by Vignes and his children, or to foreclose the mortgage executed by the Sansevains to Vignes, the result, as to Rene, will be the same. The instrument of April 13, 1851, is not under seal, and whether properly executed and acknowledged in other respects or not, was not entitled to record under the act concerning conveyances, as it stood at the date of the instrument. The record, therefore, did not impart constructive notice of its contents to anybody; and unless Rene had actual notice of the contract embraced in the instrument, he was not affected by *it. The Court found, as [453] a fact, that Rene took without notice. The appeal is

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from the judgment, and on such appeal the finding is conclusive, provided the fact of notice was put in issue by the pleadings. It has been settled by numerous decisions that findings of fact can only be reviewed on appeals from an order granting or refusing a new trial. The only question is, whether the allegation of notice is sufficiently denied to raise an issue. It is said that the denial of the allegation of notice is evasive, but to sustain this position the denials of other, and immaterial allegations of the complaint, are combined with the denial of notice, as though it formed a part of, and limited and qualified that particular denial. But this is not admissible. To determine whether an allegation has been properly denied or not, we must examine the answer to the particular allegation which it is designed to controvert. If, taken by itself, an issue is fairly made, and there is no admission inconsistent with this answer, the denial is sufficient. The allegation of the complaint is as follows: "Plaintiffs further allege, that at the time of taking said mortgage and said last deed of conveyance, said Rene had both actual and constructive notice of plaintiffs' mortgage on said 'Aliso' property of the 13th of March, 1851, and received both of said conveyances, subject to said prior mortgage." This is a distinct, independent allegation of a material fact, and the whole of the allegation. The answer to the allegation is as follows: "Defendant further denies that at the time of making the mortgage to him, as set up in the complaint, or at any time before the making thereof, or at the time when said deed of conveyance was made to him, or at any time prior thereto, he had actual or constructive notice, or any notice whatever, of the existence of plaintiffs' mortgage on said 'Aliso' property of the 13th of March, 1851, and denies that he had any notice, actual or constructive, or any knowledge whatever of any mortgage on said property whatever or on any part thereof, and denies he received said conveyances or either of them subject to said prior mortgage or to any mortgage whatever." This is the whole answer to that alle-
[454] *gation, and if the answer contained no other matter relating to the same instrument, we apprehend it would not be contended for a moment that the allegation of notice

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was not distinctly, squarely, and categorically negatived without ambiguity or evasion. There was an instrument set out in the complaint in *hæc verba*, dated March 13, 1851, and there is but one of that date set out or in any manner referred to. This instrument is called a mortgage in the complaint, and it is insisted by plaintiffs that it is a mortgage. And the answer describes the instrument by the same name, and by its true date, clearly identifying it, and denies any notice whatever of the existence of the document so described—"any notice whatever of the existence of plaintiffs' mortgage on said 'Aliso' property *of the 13th March*, 1851." Can it be doubted what instrument was referred to, or that this is a denial of notice of the instrument itself, rather than a denial that the instrument is a mortgage? It is true, that, in a preceding portion of his answer, when controverting a different allegation, the defendant "denies that said pretended instrument of 13th March, 1851, was a legal mortgage and incumbrance upon said "Aliso" property, or any part thereof, within the meaning and description of the conveyance, undertaking, and mortgage of the said Pierre, Paula S., and J. L. Sansevain, and denies that said Sansevains became liable," etc.; but this has no connection with, or reference to, the allegations or denials of the notice in question. On the contrary, it is an answer to another and distinct allegation of the complaint, viz.: "Plaintiffs further allege that said instrument of March 13, 1851, was a legal mortgage and incumbrance upon said 'Aliso' property, within the meaning and description of said conveyance, mortgage, and undertaking of said Pierre, Paula S. and J. L. Sansevain," etc. It was no part of the answer denying the allegation of notice, and not intended to qualify it. Here was a separate and distinct allegation of the complaint, which the defendant was called npon to deny, or to omit to deny at the risk of having it deemed material, and as such admitted to be true against him. But must he also deny *it, at the risk of having his denial regarded [455] as forming a part of, and qualifying his answer to, another clearly material allegation, rendering the latter denial evasive? We think not. Each denial must be regarded as applying to the specific allegation it purports to answer, and

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not as forming a part of an answer to some other specific and entirely independent allegation. The same answer may be made to all the other instances wherein it is claimed that other portions of the answer must be regarded as qualifying the answer to the allegation of notice.

We will notice one more example wherein the answer is said to be evasive, more for the purpose of condemning the complaint than the answer. The plaintiffs in another part of their complaint allege, "that said Rene, before the execution of said mortgage to him of said 'Aliso' property, dated December 7, 1860, by said J. L. and Pedro Sansevain, sent from San Francisco to Los Angeles, as plaintiffs are informed and believe, a special agent or attorney, who examined the records of said county, took a copy of said mortgage or agreement of 13th of March, 1851, was fully informed of the existence thereof and all the facts connected therewith, and duly reported and represented the same to Rene prior to the execution of said mortgage on the 7th December, 1860." The answer denies in the language of the allegation the sending of a "special agent and attorney," or that "any such special agent or attorney examined the records," etc. And it is said that this is evasive, because the answer uses the term "*special*" which is also in the allegation. Admit it to be so, and that this mode of answering is reprehensible, yet the complaint is equally reprehensible. The whole allegation is immaterial, and required no answer at all. This is pleading mere evidence, and is a mode of fishing for testimony not countenanced by our system of practice. We have no bills of discovery. If the plaintiff required the testimony of the defendant, the proper mode of obtaining it was to put the defendant upon the stand as a witness. He is not bound to answer all matters of evidence which the plaintiff chooses to allege. The [456] office *of a complaint is, to aver the material issuable facts, which constitute the cause of action, and not the evidence to prove those facts. (Green *v.* Palmer, 15 Cal. 411; Coryell *v.* Cain, 16 Cal. 567; Wilson *v.* Cleaveland, 30 Cal. 192; and Larco *v.* Casaneuava, 30 Cal. 561.) The material fact to be alleged in this case, was, the notice on the part of Rene of the transaction between Vignes and his chil-

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dren, evidenced by the instrument of March 13, 1851. This fact had already been alleged. The sending of a special agent or attorney to Los Angeles to examine the records, and make a copy of the instrument, etc., would be evidence tending to prove notice, but it is not the issuable fact itself. It is not only not necessary, but it is highly improper, to allege such matters. "A material allegation in a pleading is one essential to the claim or defence, and which could not be stricken from the pleading without leaving it insufficient." (Pr. Act, sec. 66.) This entire allegation might have been stricken out without leaving the complaint insufficient. It was therefore immaterial. But it is only material allegations that are admitted, when not specifically controverted by the answer. (Id., sec. 65.) Conceding, then, the denial to be defective, the allegation was not admitted. But the answer to this allegation closes as follows: "Defendant alleges that prior to the execution of the mortgage and deed to him as set up in the complaint, he was entirely ignorant of the existence of any *claim*, or incumbrance, or mortgage held by the plaintiffs, or either of them, or any of them, upon said 'Aliso' property, or any part thereof," etc., which would also seem to sufficiently negative notice of plaintiffs' *claim*.

It is by such answers to independent and immaterial allegations that it is sought to qualify the direct answer to the material allegation of notice, of which answer they form no part, and thereby work out a defective issue on that point. We think the notice was fairly in issue, and that any other construction would be unreasonable, and render it hazardous for any defendant to answer immaterial matter at all, and require him to determine at his peril whether matter alleged *is immaterial. Besides, no such point was [457] made or relied on in the Court below, but, on the contrary, it clearly appears that the plaintiffs regarded the notice as being in issue, for they introduced testimony to establish the fact, and the issue was closely contested in the Court below, and distinctly found against them. In fact, it was the principal issue, so far as Rene is concerned. Had the plaintiffs relied upon the admission of this fact by the pleadings,

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and for that reason abstained from introducing any evidence on the point, or had he objected to introducing any evidence on the point, on the ground that there was no issue, and the objection had been overruled, there would be some propriety in making the point here. But after treating the fact as properly in issue, and vigorously litigating it in the Court below, thereby misleading his adversary, it is now too late, after the issue is found against him, to take any such mere technical objection for the first time in this Court.

The covenant in the mortgage of the Sansevains to Vignes to "pay and discharge all legal mortgages and incumbrances of whatever nnture and description" on the premises, did not put Rene upon inquiry as to any incumbrances which were not matters of record. There was a mortgage of record to which this covenant could properly be referred. He was not bound to look beyond the record. He cannot be charged with constructive notice of any instrument improperly recorded. It makes no difference, then, whether the instrument of March 13, 1851, is within the covenants of the Sansevain mortgage to Vignes or not, unless Rene had actual notice; and the Court has found that he had no notice. The judgment as to Rene must, therefore, be affirmed. This is a separate appeal from that of the Sansevains and Requena, and from a different part of the judgment. There being no connection between the two appeals, it is unnecessary to await the determination of the other appeal.

Judgment affirmed as to defendant Rene.

[458] *CURREY, C. J., dissenting:

In my judgment, the answer, when examined as a whole, does not traverse the allegation of the complaint charging him with notice of the existence of the instrument bearing date the 13th of March, 1851. He first lays the foundation for his denial of notice by denying that such instrument was a mortgage, and then says in substance that he had not notice of the mortgage. The case, in my opinion, falls within Brown v. Scott, 25 Cal. 189. I am of opinion the judgment should be reversed, and a judgment entered for the plaintiffs,

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declaring the premises subject to the mortgage. I may hereafter express my opinion more fully on the subject.

Mr. Justice SANDERSON did not express any opinion.

WILLIAM O'CONNELL *v.* WILLIAM DOUGHERTY.

LEGAL TITLE TO CONFIRMED MEXICAN GRANT. — A judgment of the Board of Land Commissioners, or of the District Court of the United States, that the claim of the petitioner to a Mexican or Spanish grant is valid, and that the same be confirmed, vests in the petitioner the legal title, notwithstanding he petitioned as administrator with the will annexed of the estate of the grantee, by which will the land was devised to several different persons, himself among the number, and stated the contents of the will in his petition, and prayed that the land might be confirmed to the parties entitled thereto, and notwithstanding his appointment as administrator was void.

IDEM, EQUITABLE TITLE.—In such case, the devisees under the will, other than the petitioner, have an equitable title, and the confirmee holds the legal title as trustee for the benefit of the devisees.

EJECTMENT.—Ejectment cannot be maintained on an equitable title.

[1] EJECTMENT ON EQUITABLE TITLE.—If the confirmee of a Mexican grant holds the legal title acquired by the confirmation in trust for other persons, such persons cannot maintain ejectment for the land.

APPEAL from the District Court, Fourth Judicial District, Contra Costa county.

The plaintiff recovered judgment in the Court below, and the defendant appealed.

The other facts are stated in the opinion of the Court.

**Thomas A. Brown*, for Appellant. [459]

It was contended on the trial that the confirmation was to all the heirs named in Joaquin's petition filed before the Board, and that either or any of the heirs could, under the decrees of confirmation, maintain ejectment to recover his share; but the appellant submits, that in all the decrees confirming the title, as also the decrees approving the survey, Joaquin I. Castro alone is recognized as the petitioner and confirmee: he alone petitioned the Board, and to him alone

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[1] Approved, Hartley *v.* Brown, 46 Cal. 204.

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was the land confirmed; and being the confirmee and holding the legal title, as such can alone maintain ejectment for the recovery of any part of the land. (Estrada *v.* Murphy, 19 Cal. 272; Clark *v.* Lockwood, 21 Id. 222; Emeric *v.* Penniman, 26 Id. 119.) The use of the title "administrator" in the petition of Joaquin was only a description of the person: the confirmation was to Joaquin I. Castro, and the plaintiff does not deraign title to the premises from Joaquin, but from Victor Castro, one of the other heirs. If Joaquin, by his declaration contained in his petition to the Board of Land Commissioners or otherwise, has shown himself to be the trustee of the other heirs of Francisco M. Castro, that will not alter the case: as such trustee, he holds the legal title, and he alone can maintain ejectment. (Moor *v.* Spellman, 5 Denio, 227; Estrada *v.* Murphy, 19 Cal. 272.) A court of equity, upon a proper showing, if he be a trustee, will control the estate in his hands, and compel him to execute the trust. (Estrada *v.* Murphy, 19 Cal. 272; Story's Eq. 98, 976–999, 1058–1060.)

W. W. Crane, for Respondent.

Respondent claims that as a matter of fact and law the confirmation was to the several heirs at law of Francisco Castro, deceased, including Victor Castro, his (respondent's) grantor, instead of to Joaquin I. Castro, administrator. The grant of Governor Figueroa was directly to the heirs of Francisco Maria Castro. The petition for confirmation was really [460] *the petition of all the heirs of Francisco through Joaquin as their mouthpiece. The prayer indicates its true character. If the "petitioner" was Joaquin I. Castro alone, yet, as above shown, his claim was made on behalf of his co-heirs as well as himself; and viewed in this light, the judgment "that the application for a confirmation be allowed," must, by every reasonable intendment, have reference to the application actually made, which was that the land be confirmed to the parties entitled thereto, to wit, the heirs of F. M. Castro, deceased. Afterwards, on the 24th of February, 1858, the U. S. District Court, on appeal, affirmed the decree of the Board of Land Commissioners. The language

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of this decree of affirmation is: "That the said decision be and the same is hereby affirmed; and it is likewise fnrther ordered, adjudged, and decreed that the claim of the said appellant is a good and valid claim." We therefore respectfully submit, that taking the petition and the several decrees of confirmation together, the only reasonable construction is, that a confirmation was had in favor of all the heirs of Francisco M. Castro, deceased. In the case of Estrada *v.* Murphy, 19 Cal. 272, Murphy petitioned for confirmation to himself alone, and the decree confirmed the land to him alone. In the case of Clark *v.* Lockwood, 21 Cal. 220, it appears that the petition to the Board of Land Commissioners was by Payson in his own behalf, and the confirmation was to him alone.

By the Court, SAWYER, J.:

This is an action to recover possession of a tract of land, being a part of the San Pablo Rancho, in Contra Costa county. Prior to 1831, Governor Arguello made a grant of three square leagues of land in Contra Costa county to Francisco Maria Castro. Said Castro shortly afterward went into possession, made improvements, and thereafter occupied the lands granted till his death, in 1831. Said Castro left a will, by which he devised one-half of said lands to his surviving wife, and divided the other half equally among his eleven children—*one of his sons, Joaquin Isidro Castro, [461] being named executor. Afterward, in 1834, on the petition of said Joaquin Isidro, for himself and the other parties in interest, Governor Figueroa recognized the former grant of said Francisco, and, upon his order, a formal title was made out and delivered to said Joaquin I. Castro, as the testamentary executor of said Francisco, for the benefit of the successors in interest of said Francisco. In 1852, said Joaquin procured letters of administration, with the will of Francisco annexed, to be issued to him by the Probate Court of Contra Costa county. Subsequently he presented in his own name, describing himself as administrator, a petition for confirmation of said grant, to the Board of Land Commissioners. It commences as follows:

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"Joaquin Isidro Castro, administrator, with the will annexed, of the estate of Francisco Maria Castro, deceased, respectfully represents." It then states the foregoing, among other facts, giving the names of the devisees and their heirs, etc., then interested in the estate. Throughout the petition the applicant for confirmation is continually referred to as "this petitioner," "petitioner represents," "petitioner further represents," etc. No person other than himself is made a party, or in any way purports to speak in the petition. He states his appointment as administrator, and evidently intends to represent the entire estate. The petition, however, closes with the following prayer: "Wherefore, petitioner prays that said land may be confirmed and granted to the parties entitled thereto as aforesaid." The decree of confirmation by the Land Commissioners is in the following words: "Joaquin Isidro Castro, ad., etc., of estate of Francisco Castro, deceased, *v.* The United States. In this case, on hearing the proofs and allegations, it is adjudged by the Commission that the claim of the petitioner is valid; it is therefore decreed that the application for confirmation be allowed," etc. And, on appeal to the District Court, it is "decreed that the claim of the said appellant is a good and valid claim, and the same is hereby confirmed," etc. It is clear that this proceeding was had in the name of said Joaquin I. Castro, and the confirma-
[462] ation was *to him alone. Whether his appointment as administrator was void, or valid, can make no difference. The confirmation was to him, and the legal title is in him, or will be when the patent issues; and for all the purposes of this action, under the act of June 14, 1860, he stands in the same position as he would if the patent had issued. (Seale *v.* Ford, 29 Cal. 106.)

The plaintiff deraigns title to one undivided twenty-fourth part of the premises in question through Victor Castro, one of the sons and devisees of Francisco Castro, and claims to recover on said title. He insists that the confirmation was in favor of all parties in interest, because their names were stated in the petition, and because of the form of the prayer. But his grantor was no party to the petition or to the record, and the land was not confirmed in his name, but to the petitioner

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in the record, Joaquin I. Castro, in whom the legal title is. The devisees named in the petition are not parties to the proceeding, and are in no way bound by the averments in respect to their interest therein contained. It might ultimately turn out that these averments are not true, and that the real parties beneficially interested were entirely different. The plaintiff, claiming under Victor Castro, has but an equitable estate. Joaquin I. Castro, doubtless, holds the legal title as trustee for the benefit of the devisees or heirs of said Francisco, whoever they may, in fact, be, and their successors in interest; but, however this may be, the legal title is in him as confirmee. He was the only *party* known in the proceeding, or bound by the decree of confirmation. The Court will in a proper action compel the trustee to convey to the real parties in interest. (Salmon *v.* Symonds, and cases cited, 30 Cal. 301.) Until he does convey, actions for the recovery of the land based upon the title must be brought in his name. These principles have already been settled in this State. (Estrada *v.* Murphy, 19 Cal. 272; Clark *v.* Lockwood, 21 Cal. 222; Emeric *v.* Penniman, 26 Cal. 119.) It follows that the plaintiff cannot maintain this action on his title derived from Victor Castro.

Judgment reversed, and cause remanded.

*SHAFTER, J., dissenting: [463]

The legal title is in the person or persons in whom the decree adjudges the right of confirmation to be vested. This raises a question of construction. The decree of the Commissioners adjudges, first, "that the claim of the petitioner is valid;" second, "It is therefore decreed that the application for a confirmation be allowed." The character of the petitioner's "application" is to be gathered from the petition—its allegations and prayer. The petition having stated facts showing that the right to confirmation was in the devisees of Francisco Maria Castro—the petitioner himself being one of the number—and not in the estate of the devisor, prays that "said land may be confirmed and granted to the parties entitled thereto as aforesaid." From the allegations, and the prayer that follows them, it is apparent to my mind

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that the petitioner "claimed," among other things, that he and the other devisees were entitled, as such, to confirmation, and that he "applied" to have the land "confirmed and granted" to those parties, for the reason that they were so "entitled." This was the "application" that was "allowed." The decree of the District Court was as follows: "It is hereby ordered, adjudged, and decreed that the said decision be and the same is hereby affirmed; and it is likewise further ordered, adjudged, and decreed that the claim of said appellant is hereby confirmed to the extent of four leagues." The apparent difference between the two styles of expression in the decree should be harmonized, if possible, and this may be very readily done by adding, after the word "leagues," the words "in manner and form above stated." The case is distinguishable from those cited in the majority opinion. In Estrada *v.* Murphy, 19 Cal. 272, it was agreed that the premises "were finally confirmed to said Martin Murphy and no other person, under the act of Congress," etc. This stipulation excludes all idea of a confirmation to Estrada, as devisee of the heir of the original grantee. In Clark *v.* Lockwood, 21 Cal. 220, the petition stated no title but one vested [464] in the petitioner, and the *confirmation was of that title, according to the prayer. In Emeric *v.* Penniman, 26 Cal. 119, the confirmation was in terms to the heirs of Penniman, the grantee, and it was held that his administrator could not bring ejectment for that reason. That decision, like the others, establishes the general principle that the right to sue in ejectment is in the party who has the legal title, and that the legal title, in the class of cases to which the one at bar belongs, is in the person or persons to whom the decree runs. Accepting, and not controverting, these conclusions, I consider that the decree in Castro *v.* The United States, when read in the light of the rights asserted and of the "application" expressed in the petition to which the decree refers, imports a confirmation to the devisees of Castro, of whom the plaintiff was one, and not to the plaintiff as administrator. On these grounds, I consider that the judgment should be affirmed.

Mr. Chief Justice CURREY did not express any opinion.

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JULY TERM, 1867.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

JULY TERM, 1867.

GEORGE F. BENKERT *v.* RICHILDE BENKERT.

DIVORCE.—If the referee in an action for divorce finds the facts, the Court should disregard the finding, and determine the cause upon the evidence.

DIVORCE FOR DESERTION.—The word "wilful," in the phrase "wilful desertion by either party for the period of two years," used in the statute concerning divorces, signifies intentional. Said word does not imply malice.

WHEN DESERTION IS PROVED.—Desertion by husband or wife is made out when it is shown that the absence commenced and has continued during two years, without the consent and against the objections of the other party.

CONDONATION OF DESERTION.—If the desertion of husband or wife has continued for two years, the offer of the offending party to return and live and cohabit with the other will not defeat an action for a divorce, unless the offer is accepted and acted on. An offer to receive the offending party may be withdrawn.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

The plaintiff appealed from the judgment.

The other facts are stated in the opinion of the Court.

**Theodore H. Hittel*, for Appellant. [468]

The learned Court below seemed to think that the deser-

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tion, though actual and without good cause, was not *wilful*. It was not pretended that there had not been actual desertion, nor was it pretended that the defendant's return after over four years, for the purpose of preventing a divorce, was any excuse; but, neither the going without the husband's consent, nor the remaining away without his consent, was considered wilful.

The provision in the statute in relation to wilful desertion covers a case of intentional desertion. Desertion can be proved without showing violence of act or language. (Morrison *v.* Morrison, 20 Cal. 431; Hall *v.* Hall, 4 Allen, 39; Leavitt *v.* Leavitt, Wright, 719; Guembell *v.* Guembell, Id. 226; Evans *v.* Evans, 5 B. Mon. 278; 2 Bish. on Div. 673.)

R. A. Thompson and *J. A. Woodson*, for Respondent.

The case of Hardenburg *v.* Hardenburg, 14 Cal. 654, is evidently the rule of this Court upon wilful desertion. To some extent, the circumstances are similar. Up to the hour of parting in this case, as in that, the parties cohabited together as man and wife, and, as say the Court in the case referred to, "the intercourse of the parties seems to have been of the most pleasant and agreeable character. Their treatment of each other was at all times kind and affectionate."

In Hardenburg *v.* Hardenburg, the plaintiff could not induce the defendant to consent to accompany him to California. The Court say it was a proposition addressed to the discretion of the wife, and so refuse a confirmation of the decree. So here, the objections of the plaintiff were such only as were addressed to the discretion of the wife, and all the evidence shows she so only regarded them. Hence, there was no wilful desertion.

[469] *By the Court, RHODES, J.:

The Court Commissioner to whom this case was referred reported the evidence and also the facts as found by him. It is provided by the supplementary act of 1857 concerning divorces (Stat. 1858, p. 240) that it shall not be lawful for the Court to grant a divorce "upon any statement or finding

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of facts by a referee, but only upon the legal testimony taken in the cause." The finding of a Court Commissioner is included within the spirit and meaning of the prohibition, and the Court accordingly determined the cause upon the testimony without regard to the finding of facts filed by the Court Commissioner. The Court refused a divorce and dimissed the bill, and the question presented is whether the evidence justified the decision. The record does not indicate the ground upon which the Court placed the decision; but it would appear from the plaintiff's brief that it was on the ground that the evidence did not show that the desertion was wilful.

One of the causes for a divorce, enumerated in the fourth section of the act concerning divorces, is "wilful desertion by either party for the period of two years." It appears from the evidence that the defendant left the residence of the plaintiff in Philadelphia in 1861 and went to Germany, where she remained until October, 1865; that the parties have not cohabited since the defendant left for Germany; that she left the plaintiff and remained absent from him during all that period without his consent and against his objections; that she returned from Germany to New York in November, 1865; that neither at the time she left the plaintiff in 1861, nor during her absence until shortly before her return, had she any intention of returning to the United States or of cohabiting with the plaintiff; that she returned with the intention of offering and did offer to live with the plaintiff; that in April, 1865, he wrote to her that if she did not return that summer she should never return; that he was not aware of her return until January, 1866, and that upon her offer at that time to live with him he refused to receive her. It thus clearly appears that she had deserted the plaintiff for more [470] than the period of two years, and the inquiry is now presented whether the evidence brings the case within the statute as being wilful.

Bishop, in his work on marriage and divorce, says, (sec. 506): "The offence of desertion is obviously composed of—first, an actual breaking off of the matrimonial cohabitation; secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete." The

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desertion must be wrongful—that is to say, without sufficient justification or excuse. If the parties have separated by mutual consent neither can say that the absence of the other was wrongful, at least not until the consent was revoked, though each may have intended to abandon the other. When one party, by force or fraud, by acts, words, or general conduct, causes or induces the other to break off the matrimonial cohabitation, he cannot complain, for the desertion was the result of his own wrong. A sufficient excuse would of course obviate the wrong of the desertion. "Wilful" ordinarily signifies intentional, and that, we think, is its signification here. It does not imply any malice or wrong toward the other party. The word does not seem to have limited the meaning of the term "desertion," as construed in the cases and employed by text writers. The cessation of matrimonial cohabitation is never treated as desertion unless it is both intentional and wrongful. There may be a malicious intent in the desertion, but its presence is accidental. It does not form a necessary ingredient of the offence.

Accepting the term wilful desertion as importing an intentional and wrongful cessation of matrimonial cohabitation, the charge we think is fully proven. There is no rule requiring the injured party to interpose either force or positive commands. The desertion is made out when it is shown, as in this case, that the absence commenced and has continued during the prescribed period, without the consent and against the objections of the other party. The defendant left
[471] and *remained absent from her husband without justification or excuse.

The counsel for the defendant urge that she repented her act "prior to the desertion culminating or his gaining a right under the statute." She manifested no intention of returning until long after the period of two years of wilful desertion had elapsed. Her repentance did not obliterate the offence. If it had been accepted and acted on by the plaintiff, by receiving her and renewing the cohabitation, it would be regarded as a condonation. But he may, after the lapse of the statutory period, refuse to accept the offer. Bishop, sec. 530, in speaking of the offer to return, says that if it is made in

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good faith within the period prescribed by the statute to complete the offence, it will bar the suit. "But after the time has expired and the right of action has fully accrued, the injured party is not obliged to accept such an offer: it comes too late."

The letter of April, 1865, which may be construed as an offer on the part of the plaintiff to receive the defendant, should she return during the ensuing summer, does not preclude him from availing himself of the remedy which the law affords him for the desertion. It was not binding upon him unless accepted and acted upon. Until the cohabitation was renewed he was at liberty to retract the offer. It does not appear that he was apprised of her intention to return until January, 1866, and he may well have thought she again refused, as she had previously done, to comply with his request to return and live with him as his wife.

We are of the opinion that the evidence authorized and required the Court to grant a divorce.

Judgment reversed and cause remanded, with directions to enter a decree for the plaintiff as prayed for in his complaint.

Mr. Justice SHAFTER did not express any opinion.

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*J. J. ROBBINS v. THE OMNIBUS RAILROAD COMPANY. [472]

STREET RAILROADS IN SAN FRANCISCO.—Companies operating street railroads in San Francisco are only required to keep in repair that part of the street lying between the rails along which the cars run and between which the horses travel. They are not required to keep in repair that part of the street lying between a double track.

MEANING OF WORD USED IN TWO ACTS.—When two acts are *in pari materia*, or one is an amendment of the other, it will be presumed that a word used in a certain sense in the first act was used in the same sense in the subsequent one.

APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

The plaintiff recovered judgment in the Court below, and the defendant appealed.

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The other facts are stated in the opinion of the Court.

Haight & Pierson, for Appellant.

Horace M. Hastings, for Respondent.

By the Court, SHAFTER, J.:

The complaint alleges that the defendant owns and operates a horse railroad, consisting of a double track, in and upon Third street, between Howard and Folsom streets, in the city of San Francisco, and the purpose of the action is to recover of the defendant five hundred and twenty dollars for "repaving the space between the rails of defendant's said railroad, to wit: the space of two thousand feet." It appears that on Third street the defendant's road has a single track for a part of the way and a double track for the residue; that the double track is but a continuation of the single track, running out of it and into it. The space for the repaving of which the suit is brought is the space between the double tracks, and it is stipulated that the only question involved is as to the obligation of the defendant to keep this space between the two single tracks—constituting the double track—in repair.

The question turns upon the construction to be given [473] to the *second section of an act passed on the 2d of April, 1866, entitled "An act to regulate the rates of fare and paving on certain street railroads in the city and county of San Francisco." (Stat. 1866, p. 850.) The section is as follows: "All persons or corporations owning, maintaining, or operating railroads heretofore or hereafter constructed in the city and county of San Francisco for the transportation of passengers in cars drawn by horses, shall keep the space between the rails in thorough repair by paving, planking, or macadamizing the same, as required by the Board of Supervisors of said city and county; but shall not be required to pave, plank, or macadamize any portion of the street outside of the track of such road; and in all contracts for street work the contractor shall pave, plank, or macadamize the entire width of the street let, except that portion between the rails of any street railroad above referred to." It will be seen that

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the space which the companies named in the act are to keep in repair is defined as the "space between the rails;" and the only question to be considered is as to what rails are here referred to. It is insisted by the defendant that the rails between which it is bound to repair are the rails along which the cars run and between which the horses travel—and that where there are two such sets of pairs of rails, forming what is called a double track, the test of liability is the same nevertheless. The respondent, on the other hand, while he both admits and claims that the space between the rails named is covered by the liability, insists that the rails bounding the space between two single tracks—and over which rails the cars do not run and between which the horses do not travel—are rails within the meaning of the act; and that the companies are therefore bound to repair the space between these rails also.

One of the three descriptions given in the act of 1866 of the space which the companies are to keep in repair is negative in its character—that is to say, the space is not "any portion of the street outside of the track of such road," which is the same as saying that it is that portion of the street which *lies inside the track. If, then, the word "track" [474] is applicable to the space between two single tracks, as the respondent claims it to be, then the rails by which that space is bounded must be considered as "rails" between which the companies are to repair; otherwise not. Now it is provided in the third section of the act of 1861, (Stat. 1861, p. 190,) under which the defendant claims by assignment, that "the track of said railroad shall not be more than five feet wide within the rails, with a space between the double tracks sufficient for the passage of the cars." Here two distinct spaces are referred to and described. The first is described as lying "within the rails" and is called the "track;" from the other space not only is that name withheld, but no other name is given to it. It is described in a general way as "a space between the double tracks." But that the two spaces are entirely distinct from each other in the eye of the section is further shown by the fact that the maximum width of the one to which the term track is applied is fixed at five

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feet, while nothing is said concerning the maximum width of the other; the only direction given is as to the maximum width of the space, which is required simply to be "sufficient for the passage of the cars." From this it is entirely manifest that the term "track" does not, in the meaning of the section, include the space between double tracks, but is confined to the only space remaining, that is to say, the space bounded by the rails along which the cars run and between which the teams travel, and the greatest width of which is limited to five feet. This definition of the term "track," as used in the act of 1861, must be considered as presenting the true sense in which the same word is used in the act of 1866. The two acts are not only *in pari materia*, but the latter is, in effect, an amendment of the former; and it is not to be supposed that a word used in a certain sense in the original act was used in a different sense in the subsequent one. The track, then, outside of which the defendant is not to repair, but inside of which it is to repair under the act of 1866, being defined by the act of 1861, itself determines the rails
[475] bounding the space between which the *defendant is to repair. They are the two rails along which the cars run. In fact, both terms, "rails" and "track," are separately defined in the act of 1861, and the definitions mutually support and illustrate each other.

As the question is clear upon the statutes having to do with it, we do not find it necessary to advert to the considerations of justice or convenience that may bear, or which may be supposed to bear upon it, nor to the learned, nor the popular meaning of the words whose meaning we have considered.

Judgment reversed, and new trial ordered.

Neither Mr. Justice RHODES nor Mr. Justice SANDERSON expressed any opinion.

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HARRIET H. DOLL v. JOSEPH SMITH.

[1] AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL.—An affidavit of service of a notice of appeal on the respondent's attorney, if it does not show a personal service, must state that the notice was left in his office with his clerk, or with a person having charge thereof, or that no person was in the office, and that the notice was left there in a conspicuous place, between the hours of eight in the morning and six in the afternoon.

APPEAL from the District Court, Second Judicial District, Tehama county.

Plaintiff recovered judgment in the Court below, and the defendant appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for the Motion.

W. S. Long, and *Robinson & Dunlap*, against the Motion.

By the Court, SAWYER, J.:

This case was submitted subject to a motion to dismiss the appeal upon exceptions to the record duly filed, upon the ground that the affidavit of service of notice of appeal does not show due service. The service was not personal, but *there was an attempt to procure substituted ser- [476] vice on the attorney under section five hundred and twenty of the Practice Act, which provides that service may be made as follows: "If upon an attorney, it may be made during his absence from his office by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of eight in the morning and six in the afternoon in a conspicuous place in the office." The affiant in his affidavit of service says he "served the within notice on the plaintiff, by leaving a copy of the same at the office of J. G. Doll, plaintiff's attorney, in the town of Red Bluff, on the 23d day of July, 1866." This affidavit fails to show a number of facts essential to constitute a valid ser-

[1] Cited, Moore v. Besse, 35 Cal. 187.

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vice under the statute. It does not appear whether the attorney was absent, or whether any clerk was present, or anybody in charge of the office or not. If the attorney is present the service must be personal; if a clerk, or some one in charge of the office, it is necessary to leave the notice with such clerk or person in charge. If no one is present, it must be left "in a conspicuous place in the office." In this instance, for aught that appears to the contrary, it may have been put in the stove, or some other place where it was not likely to be found. If there was no person in the office, service could only be effected by leaving the notice "between the hours of eight in the morning and six in the afternoon." The time when the notice was left does not appear. The affidavit fails to show these essential facts, and therefore fails to show a valid service. The appeal must be dismissed on this ground. We have looked into the record, however, and are satisfied that the judgment would have to be affirmed if decided on its merits.

Appeal dismissed.

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[477] *ELI MAYO *v.* AH LOY, AND THEODORE LE ROY AND L. LEHMAN, INTERVENORS.

STREET ASSESSMENTS IN SACRAMENTO.—Street assessments in Sacramento are required to be levied and collected as provided in the general revenue laws of the State.

IDEM.—Assessments for improvement of streets in Sacramento are required to be listed to the owner, if known; if not known, to him as "unknown owner."

IDEM.—If such assessment is not paid, the District Attorney must sue the person assessed, the real estate, and "all owners and claimants" to the same.

[1] CONCLUSIVENESS OF JUDGMENT FOR TAXES.—When such assessment is thus made and the suit is thus brought, and the summons is properly served, the judgment when rendered is conclusive and binding upon all the world.

JUDGMENT FOR TAXES.—Upon the question whether a judgment is merely voidable or absolutely void, there is no distinction between judgments for taxes and judgments for other causes of action.

VOIDABLE JUDGMENT FOR TAXES.—Although property on I street cannot be lawfully taxed for improvements on J street, yet if it is done, and suit is brought and service of process obtained and judgment rendered as required by law, the judgment is not void, but only erroneous and liable to be reversed on appeal.

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[1] Cited, People v. Doe G. 1034, 36 Cal. 222. Commented on, Eitel v. Foote, 39 Cal. 440.

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[1] VOID JUDGMENT FOR TAXES.—If the owner of the property assessed for street improvements in Sacramento is not made a party to a suit to collect the same, and the action is not brought against "all owners and claimants," and service is not made on the real estate, the judgment is void.

APPEAL from the District Court, Sixth Judicial District, Sacramento county.

The east half of the west half of lot three in the block between Second and Third and I and J streets, Sacramento, was assessed to F. LeRoy in 1864, for grading I street from Front to Sixth. The lot assessed fronted on I street, and was the property of Theodore LeRoy. The tax was returned as delinquent. The District Attorney brought an action against "F. LeRoy Coe 1847, John Doe, and the said real estate," to recover judgment for the tax. In the complaint the District Attorney inadvertently alleged that the tax was levied for the improvement of J street instead of I. The summons was entitled "People, etc., *v.* Doe 1847, F. LeRoy, John Doe, Richard Roe, and the said real estate, as defendants," and was addressed to said defendants. Judgment was rendered by default, and the proper process having been issued the Sheriff sold the property to Eli Mayo in June, 1865, and no redemption having been made, executed to him a deed.

*Mayo, on the 10th day of January, 1866, petitioned [478] said Court for a writ of assistance to be placed in possession of the property. The petition set forth that Ah Loy and others were in possession. LeRoy and Lehman were allowed to intervene. The Court below made an order denying the writ of assistance, and the petitioner appealed.

The other facts are stated in the opinion of the Court.

Robinson & Dunlap, for Appellant.

If the Court below had jurisdiction of the subject-matter of the original tax suits, then we contend that the judgment and decree entered therein was conclusive of the rights of all owners and claimants of the said premises and of the said real estate; and that the Court below could not in this proceeding go behind that judgment and decree to inquire into

[1] Cited, King *v.* Randlett, 33 Cal. 322.

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the legality thereof, or the errors therein; but that judgment was and is conclusive of the matters therein found. The general rule applicable to all judgments is, that they cannot be impeached in a collateral action for error and irregularity. (Rowley *v.* Howard, 23 Cal. 404.) When a Court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise its judgments until reversed are considered as binding. (Elliott *v.* Piersol, 1 Pet. 340; The Chemung Canal Bank *v.* Judson, 4 Seld. 259.)

H. H. Hartley, for Respondent.

There is a material difference between void and voidable judgments. If a judgment is only voidable, its defects cannot be inquired into in a collateral proceeding, but if void it may be entirely disregarded and treated as a nullity. This rule, and the distinctions arising under it, are too familiar to need comment, and are only alluded to for other purposes. In a proceeding against property for the collection of taxes, each act required by the statute to be performed is necessary to be done to give the Court jurisdiction. If there has been [479] no *order for the assessment, or valid assessment, or if the requirements of the statute have not been fulfilled, then all the proceedings are void for the want of such essential requirements. And so with every step necessary to link the chain of title of the proprietor to that of the purchaser under the tax deed, each requirement of the law being a link in the chain of title. The complaint which was the basis of the action demanded of the real estate, which was on I street, to answer the plaintiff's claim for the improvement of J street, and that in default of payment it would be sold to pay the same. Now the summons and printed notice referred to the complaint and did not state it differently. The real estate could not by law be bound for such a payment, and the owner, if he saw the summons and went to the complaint, could also only have learned from it that the real estate could not be liable for such a tax. The Court could only by its judgment direct the sale of property on I street for the improvement of I street, and not far the improvement of J street.

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By the Court, SANDERSON, J.:

The charter of the city of Sacramento provides that street assessments shall be levied and collected as provided in the general revenue laws of the State. (Stat. of 1863, p. 415, secs. 49 and 57.)

The general Revenue Act of 1861 (Stat. of 1861, pp. 425, 432) provides that real estate shall be listed to the owner, if known; if not known, to him as "unknown owner." If not paid, the assessment roll passes into the hands of the District Attorney, who is authorized and directed to sue the person assessed, the real estate, and "all owners and claimants to the same, known or unknown." (Sec. 39.) Process is to be served upon the real estate, the owner, and "all owners and claimants," in the manner therein provided. This being done, the Court acquires jurisdiction over the persons of all owners and claimants, known or unknown, and the subject-matter. Such being the case, the judgment, when rendered, is *conclusive and binding upon all the world [480] until reversed on appeal or set aside by some direct proceeding brought for that purpose.

Upon the question whether a judgment is merely voidable or absolutely void, there is no distinction between judgments for taxes and judgments for other causes of action. A judgment is never absolutely void if the Court had jurisdiction of the subject-matter and the person of the defendant, however erroneous it may be. Undoubtedly, property on I street cannot lawfully be taxed for the improvement of J street; yet if it should be done, and suit should be brought and service of process obtained in the manner provided by law, and a judgment finally rendered against the real estate and all owners and claimants, such judgment would not be absolutely void, for the Court would have had jurisdiction to determine that question, and by the conditions would have had jurisdiction of all persons interested in the estate. Such a judgment would be erroneous, and would be reversed on appeal, but valid and binding until reversed on appeal, or set aside by some other appropriate remedy. It follows that the mistake

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of the District Attorney in writing J instead of I in the body of the complaint does not render the judgment void.

The judgment roll in the tax suit has not been brought up, and we are therefore unable to determine for ourselves whether the Court obtained jurisdiction or not. But the Court below finds certain facts from which it appears that the judgment is absolutely void for the want of jurisdiction over the person of Theodore LeRoy, and over the real estate, also. Theodore LeRoy was not made a party by name, nor was the action brought against "all owners and claimants." No service was ever made upon him personally or by publication, nor was service made upon his tenants, or any of them, in occupation of the premises, which last must be done in order to make service upon the real estate. (Sec. 41.) Such being the case, the Court neither acquired jurisdiction over the person of Theodore LeRoy nor over the real estate.

Order affirmed.

[481] *Neither Mr. Justice RHODES nor Mr. Justice SHAFTER expressed any opinion.

D. M. W. SEATON, AND PHEBE SEATON, EXECUTOR AND EXECUTRIX OF THE ESTATE OF G. W. SEATON, DECEASED, *v.* ADOLPH A. SON, AND HENRY L. DAVIS.

[1] HOMESTEAD.—A homestead cannot be carved out of land held in joint tenancy or tenancy in common, even if the joint tenant or tenant in common, who claims the homestead, is in the exclusive possession.

OUSTER OF TENANT IN COMMON.—Taking actual possession of land under a deed which purports to convey the whole thereof, under a belief that it does convey the whole, when in fact it gives title to an undivided portion only, is not an ouster of the tenant in common who owns the other undivided part.

LEGAL AND EQUITABLE TITLE.—If the plaintiff in his complaint avers that he holds the legal title to land and does not set up an equitable title, he cannot on the trial rely on an equitable title.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

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[1] Cited, Cameto *v.* Dupuy, 47 Cal. 80.

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On the 20th day of September, 1864, John E. Brophy entered into the actual possession of a lot of land in San Francisco, at the corner of Second and Clementina streets, under a deed of conveyance from James H. Owens and wife, purporting to convey the whole lot. Brophy believed, when he entered, that the deed conveyed the title to the whole lot. Brophy continued residing on the lot with his family, until after the 4th day of October, 1864, and on the day last named filed a declaration of homestead on the same. April 10th, 1865, Brophy and wife conveyed to John C. Kernan, who, on the 4th day of May, 1865, conveyed to G. W. Seaton. Seaton died in October following, and plaintiffs were the executors of his estate. On the 14th day of October, 1864, the defendant, Son, recovered a judgment against Brophy, in said Court, which was docketed on the same day. On the 5th day of December, 1865, an execution was issued on the *judgment against Brophy, and placed in the hands of [482] defendant, Davis, who, as Sheriff, levied on and advertised the lot for sale. The plaintiffs brought this action to enjoin the sale. The Court below gave judgment in favor of the defendants, dismissing the complaint. The plaintiffs appealed.

The other facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellants.

We contend that a party out of possession, who is the owner of an outstanding title of an undivided interest in the premises which are held adversely to him, is not a tenant in common with the occupant, although the occupant is the owner of the other undivided interest in the title of the premises. If such parties are tenants in common of the title, (if such a term be not a misnomer,) that still the land is not held by the title, and not by any tenancy in common, and therefore does not come within the rule that defeats a homestead right. The legal definition of the word tenant is "a holder." As applied to lands, it means the actual occupier—the possessor of lands. Another word, or words, are often added to "tenant," in order to explain the right of the occupation, the time it may last, etc.; as "tenant for life,"

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"tenant for years," "tenant by sufferance," "tenant in fee simple," etc., etc. (See Burr. Law Dic. "Tenant" to "Tenant at Sufferance;" 2 Blackst. 59.) A "tenancy in common" is where two or more persons hold land by *several* and *distinct titles, but by unity of possession.* (3 Blackst. 191; 4 Kent Com. 367 III.; 1 Stephen's Com. 323.)

W. C. Burnett and *Drake & Hent*, for Respondents.

The appellants contend that there is a difference in the situation of tenants in common, when there is only *one* of them in *actual* possession—physically, there is a difference as to the *place of residence* of the parties, but in fact and in law they are still tenants in common—mentally, one of [483] them may *believe, or pretend to believe, that he is the owner of the entirety, yet the facts and the law remain the same. "Tenants in common are such as hold by several and distinct titles, *but by unity of possession; because none knoweth his own severalty*, and therefore they all occupy promiscuously." (2 Blackst. Com. 181.) The possession of one is the possession of all, (Carpentier *v.* Webster, 27 Cal. 541,) and this brings us irresistibly to the conclusion that a person cannot carve or dedicate a homestead out of lands as much in the legal possession of others as himself, *and of which he knoweth not his own part or severalty.*

By the Court, RHODES, J.:

The uniform construction of the Homestead Act of this State has been, that a homestead cannot be carved out of land held in joint tenancy or tenancy in common. (Elias *v.* Verdugo, 27 Cal. 418; Wolf *v.* Fleischacker, 5 Id. 244; Reynolds *v.* Pixley, 6 Id. 167; Giblin *v.* Jordan, 6 Id. 417; Kellersberger *v.* Copp, 6 Id. 565.)

At the time Brophy filed his declaration of homestead, he held the legal title to the undivided seventeen eighteenths of the premises, and the title to the remaining eighteenth was in another person. The plaintiffs contend that the doctrine of the cases above cited has no application where the tenant in common is in the adverse possession of the land which he claims to hold as his homestead, or where he alone is in the

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actual possession. The facts necessary to raise the question in respect to the alleged adverse possession are wanting in this case. There is no proof of the adverse possession of Brophy. His entry under the deed executed to him, and his belief at the time that the deed conveyed the entire title, followed by his exclusive actual possession up to the time of the filing of his declaration, did not amount to an ouster of his co-tenant. As between tenants in common, adverse possession begins with an actual ouster. Nothing short of an actual ouster will sever the unity of possession.

*Brophy's actual possession did not impair the right [484] of his co-tenant, for under the fundamental rule of the relation, his possession was *prima facie* the possession of his co-tenant. While the co-tenant possessed the right to enter upon and enjoy the common land, it was impossible for Brophy to acquire a homestead in the whole or any part of it, for that, if permitted, would destroy the tenancy in common in the land thus taken.

The plaintiffs cannot maintain the position that they hold the equitable title to the one eighteenth in question, for in their complaint they rely upon the legal title to the whole premises, without claiming the equitable title to any portion thereof; and besides this, the evidence fails to show that Brophy or they acquired the equitable title to the undivided eighteenth.

Judgment affirmed.

Mr. Justice SHAFTER did not express any opinion.

MICHAEL NOLAN *v.* MICHAEL REESE.

[1] FRAUD IN CONTRACTOR TO IMPROVE STREETS IN SAN FRANCISCO.—If the person who contracts with the Street Superintendent in San Francisco to improve a street, before the contract is made, makes a private contract with a part of the

[1] Cited, Himmelmann v. Spanagel, 39 Cal. 392; Chambers v. Satterlee, 40 Cal. 520; Himmelmann v. Headley, 44 Cal. 227; Id. 279.

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owners of the lots liable to be assessed for the improvement to do their work for less than the price allowed by the contract, this private contract is in fraud of the law under which the streets are improved; but the fraud is no defence in an action by the contractor to recover the assessment, and must be taken advantage of by a remonstrance to or appeal to the Board of Supervisors.

APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

The plaintiff recovered judgment in the Court below, and the defendant appealed.

The other facts are stated in the opinion of the Court.

Haight & Pierson, for Appellant.

Had the defendant been permitted, as he should have [485] been, *to show the private contract made by plaintiff's assignor, it would have appeared very clearly that a contract made by the contractor with the owners of one half of the frontage would render the owners of the other half powerless to act. The statute requires the owners of the major part of the frontage to elect, so that if the contractor secures only one half, the other half can take no action.

James Mee, for Respondent.

If the appellant felt aggrieved, it was his duty to have appealed to the Board of Supervisors, "whose decision shall be final." He is deemed to have acquiesced even by not appealing. (Conlin *v.* Seaman, 22 Cal. 549.)

By the Court, SHAFTER, J.:

This is an action to recover a street assessment levied in the city and county of San Francisco. The plaintiff sues as assignee of the original contractor.

First—The defendant offered to prove at the trial that the plaintiff's *assignor* "made a private contract with a part of the owners, but less than a majority of the frontage of the lots liable to be assessed, to do their work at a price less than that allowed by the contract made with the Street Superintendent; which prevented defendant from securing a protest

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by the majority of the owners against the work, and from procuring a majority to elect to take the contract." These facts were set forth as a special defence in the answer. The evidence was objected to, and was excluded by the Court.

We held, in Emery v. San Francisco Gas Company, 28 Cal. 345, and in Emery v. Bradford, 29 Cal. 75, that the adjoining property holders were not parties to the street contracts, under the act of 1862. We said that the "lot holder is in no sense a party to the transaction. When the work is accomplished, for the purpose of defraying the expenses, the municipal authorities levy an assessment upon the adjoining lands by virtue of the sovereign right of taxation delegated *by the Legislature of the State to the local [486] government for that purpose, and collect it through the contractor himself. The owner of the adjoining lot has nothing to say about it, provided there is no fatal informality in the proceedings, except so far as his wishes are consulted in the first instance as to whether or not the municipal authorities shall undertake the work; and so far as he is heard through his representative in the Board of Supervisors. The city makes no contract for him individually. His liability arises out of no agreement between him, in his individual character, and the street contractor. He simply pays because the burden has been imposed upon him in common with other citizens."

In view of these principles, the facts which the defendant offered to prove cannot be regarded as a fraud upon him as a party to the street contract in question, for he stood in no such relation. But it does not follow that the special defence could not avail him if the matter was left to the control of general principles. Under the act of 1862, a street contract does not go necessarily to the lowest bidder; for the owners of a major part of the frontage of lots and lands liable to be assessed are allowed to elect within a limited period, to take the work at the price at which it may have been provisionally awarded to the lowest bidder. And it is further provided that all proceedings under the notice shall be stayed for the period of six months, on the filing of written objections, signed by the owners of more than one-half of the frontage. It is

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unnecessary to inquire whether these provisions were inserted in the act for the benefit of the lot holders individually or for the benefit of that portion of them in which the power of interposition is vested. It is enough that these provisions were in the legislative judgment needful to the just balance or equipoise of a statute relating to the public good. These provisions constitute a prominent feature in the machinery of the act, and go directly to its policy. Though the street contract in question was free from illegality in itself considered, still assuming the facts which the defendant offered to prove, the side arrangements made by the contractor
[487] with a *portion of the lot owners, were in fraud of the method devised by the Legislature for the opening and repairing of streets, and the contract itself would therefore, on the principles of the common law, be illegal and void from the beginning. But under the provisions of the act of 1862, we are cut off from subjecting the rights of the plaintiff to the test of those principles. Should the fraud with which the contractor was charged be considered as affecting the "award of the work" to him by the Board of Supervisors, (sec. 6,) then under the fourth section of the act it should have been brought to the notice of the Board of Supervisors by a remonstrance coming from one or more of the lot owners. If on the other hand the fraud is considered as affecting the "legality of the assessment," then any person having objections to make should have appealed to the Board of Supervisors within thirty-five days subsequent to the date of the assessment. (Sec. 12.) Such are the methods pointed out by the act for reviewing the decisions of the Board and the acts of the Superintendent, and they exclude all others by positive provision. (Secs. 4 and 6; Conlin *v.* Seaman, 22 Cal. 549.) The reason for this narrowness in the remedies provided for by the act is found in the fact that the Legislature, in framing it, was providing for a matter of public concern through an exercise of the sovereign power of taxation. The meagreness adverted to has its origin in the necessities of the power. (Blackwell, 40.)

The testimony offered, to prove that the resolution of the Board ordering the work to be done was not signed by the

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Mayor was properly excluded. (Stat. 1862, p. 392, sec. 3; Taylor v. Palmer, 31 Cal. 240.)

Judgment affirmed.

SAWYER, J., concurring:

I am not prepared to say that the contract, as averred in the answer, or offered to be proved by the defendant, in any way contravenes the statute, or is in fraud of the methods devised by the Legislature. I think the testimony was *properly excluded. The other points made in the [488] briefs have been determined against the appellant in other cases before decided. I concur in the affirmance of the judgment.

W. C. DIMICK v. JEREMIAH DERINGER, FELIX McDONALD, AND BRIDGET O'HARA.

DISMISSAL OF ACTION.—The plaintiff in ejectment, if no counterclaim is made in the answer, has a right to dismiss the action as to one or all of the defendants.

DISMISSAL OF ACTION AS TO ONE OF SEVERAL DEFENDANTS.—If one of several defendants in ejectment answers and the others make default, the plaintiff may, before trial, dismiss the action as to the defendant answering, and take judgment against the others.

[1] DEFENDANT IN EJECTMENT.—When the demanded premises are in the possession of a tenant, the tenant is the proper party defendant in ejectment. The landlord is not a proper party defendant, and if made so, the Court will, on motion, order a nonsuit as to him.

[2] LANDLORD MAY DEFEND IN NAME OF TENANT.—If the tenant in possession is sued in ejectment, the landlord may, in cases in which his title is drawn in issue, be permitted to defend the action in the name of the tenant, but not in his own name.

[3] SETTING ASIDE DEFAULT.—If the tenant sued in ejectment has, by neglect or design, suffered a default, the landlord may, upon a proper showing and motion in the name of the tenant, have the default set aside.

STAY OF PROCEEDINGS UNDER WRIT OF RESTITUTION.—If the tenant and landlord are jointly made defendants in ejectment, and the tenant suffers default, and the landlord answers in his own name, and the plaintiff dismisses the action as to the landlord and takes judgment against the tenant, the Court cannot, on motion of the landlord, order a stay of proceedings under a writ of restitution.

APPEALABLE ORDER.—If the plaintiff dismisses the action before trial, and the Court, on defendant's motion, makes an order restoring the cause to the calendar for trial, no appeal lies from this order.

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[1] Cited, Mahoney v. Middleton, 41 Cal. 53.
[2] Cited, Valentine v. Mahoney, 37 Cal. 394.
[3] Cited, Corwin v. Bensley, 43 Cal. 262.

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APPEAL from the District Court, Fifteenth Judicial District, city and county of San Francisco.

The facts are stated in the opinion of the Court.

George W. Tyler, for Appellant.

Ejectment must be brought against the party in possession, either *actual* or *constructive*, and it is error for the Court upon the trial to refuse a nonsuit as to such defendants as were not in possession at the commencement of the suit. (Gar-
[489] ner *v.* *Marshall, 9 Cal. 270; Owen *v.* Fowler, 24 Cal. 194.) A party has a right to dismiss as to some defendants, and proceed as to others, (Noe *v.* Card, 14 Cal. 577; Reed *v.* Calderwood, 22 Cal. 463; Pr. Act, sec. 148;) and as Deringer was in possession as O'Hara's tenant, and he notified O'Hara of the suit and she did not defend for him, but allowed default, and as O'Hara in her answer denied that *she was in possession*, or that she *withheld* the possession, plaintiff had a right to dismiss as to her, and take a judgment for possession as against Deringer. A judgment irregularly entered can be set aside only by a party to it. (Baker *v.* Judges of Ulster, 5 Seld. 73; Reed *v.* Calderwood, 22 Cal. 463.) Bridget O'Hara is no party to the judgment, and therefore it could not have been set aside upon her motion. This is not an application for relief under section sixty-eight of the Pr. Act; nor is it an application of the landlord to be let in to defend for the tenant. It is simply a question as to whether, when several parties are sued in ejectment, and one answers *denying possession* and *withholding*, the plaintiff may treat the answer as *true*, and dismiss as to such defendant.

Henry E. Highton, for Respondent.

That part of the order of August 13th, 1866, vacating and setting aside the previous order dismissing the action as to the defendant, Bridget O'Hara, sued as Bridget McDonald, is not a "special order made after final judgment," and, therefore, is not appealable. There never was a judgment against Bridget O'Hara. (Pr. Act, sec. 347.) A party who has appeared and answered to an action, is entitled to notice before

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the dismissal thereof. In this case, Bridget O'Hara appeared and answered by her attorneys, and, without notice to them, before the case had been or could have been reached on the trial calendar, and during the very term in which the action was commenced, it was dismissed. The dismissal, therefore, was erroneous, and, if not erroneous, still upon the showing made, the Court was justified, before the expiration *of the term, in setting it aside. (Pr. Act, [490] secs. 148, 523; Pilger v. Gou, 21 How. Pr. 155, 156.)

If it be held that under subdivision two of section one hundred and forty-eight of the Practice Act, no notice is necessary, still, that subdivision provides that the *action* may be dismissed, not that a dismissal may be entered as to *one* of the defendants, and especially one who has answered. (Ex parte Nelson, 1 Cow. 422, 424, 425; Chase v. Dunham, 1 Paige, 572.) Every Court of record has inherent power to control its own process and to prevent its writs from being improperly, unfairly, or fraudulently used. In this case, the Court below legitimately exercised this power, and all the proceedings, as shown by the record, were during the same term. (Watson v. Dowling, 26 Cal. 125–127; Leese v. Clark, 29 Cal. 664.)

By the Court, RHODES, J.:

The plaintiff sued Deringer, Felix McDonald, and Bridget O'Hara, in ejectment, and Deringer and McDonald having failed to answer, he caused their default to be entered. Bridget O'Hara answered, denying generally all the allegations of the complaint. The plaintiff dismissed the action as to her, and took judgment against Deringer and McDonald for the possession of the premises sued for. The writ of restitution was executed by evicting Deringer from one parcel of the premises, and Charles Boell from the other parcel, and delivering the possession of both parcels to the plaintiff. Subsequently, and at the same term of the Court, on the motion and affidavit of Bridget O'Hara, the plaintiff was ordered to show cause, etc., and on the hearing the Court ordered that proceedings under the writ of restitution be perpetually stayed; that the Sheriff restore Deringer, or Bridget O'Hara,

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his landlady, to the possession of the premises described in the complaint; that the order dismissing the action as to Bridget O'Hara be set aside, and the cause be restored to the calendar for trial. Upon a similar motion and affidavit [491] of *Bridget O'Hara, the stay of proceedings under the writ was made perpetual, and the Sheriff was directed to restore Bridget O'Hara, or her tenant, Charles Boyle, or Bowle, to the possession of one parcel of the lands described in the complaint. The plaintiff appeals from both these orders.

The action not having been brought on to trial, and none of the defendants having filed a counterclaim, the plaintiff had the right, under the first subdivision of section one hundred and forty-eight of the Practice Act, to dismiss the action as to all or any of the defendants. The action being dismissed as to Bridget O'Hara, she was no longer a party to the proceedings. The plaintiff was entitled to take his judgment against Deringer and McDonald as it was entered. The action being a possessory action, and being required, as we have always held, to be brought against the person in possession—the occupant of the land (Hawkins *v.* Reichert, 28 Cal. 536, and cases there cited)—when the lands are in possession of a tenant, the tenant and not the landlord is the proper party defendant. The landlord is neither a necessary nor proper party defendant, and if he is made a party, the Court on the hearing will, on motion, order a nonsuit as to him. The landlord may, however, in most cases, and perhaps in all cases in which his title is drawn in issue, be permitted to assume the defence and defend the action in the name of his tenant, but there is no other mode in which he can come into the action. If the tenant has, through neglect or by design, permitted a default to be entered up against him, the landlord may, upon a proper showing, and moving in the name of the tenant, have the default set aside. In these proceedings Bridget O'Hara did not move in the name of her tenant, and we cannot conceive of any motion she was entitled to make in her own name relating to the action, the judgment, or the writ, except to have herself reinstated as a defendant. We are of the opinion that the Court erred in ordering that proceedings under the writ

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be stayed, and that Bridget O'Hara or her tenant be restored to the possession of the premises. It may not be improper to remark, without intending any reflection upon *any of the parties to this action, that in view of the [492] character of the action of ejectment, under our system of practice, some further legislation is needful in order to afford the landlord proper protection against the consequences of the laches or frauds of tenants who are sued by third persons for the recovery of the possession of the demised premises.

The first order, the one of the date of August 13th, 1866, is divisible, one part having reference to the writ of restitution and the other to the dismissal of the action as to Bridget O'Hara. The latter is not an appealable order. It is not an order subsequent to the judgment, so far as she is concerned, for there is no judgment either for or against her, and the order does not follow the judgment that was rendered in the same line of proceeding, nor is it dependent upon it, but it is interlocutory to the judgment that thereafter be rendered in the action as against her. The action having been dismissed as to her, she was entitled to move that the cause as to her be reinstated on the calendar for trial, and to have an order to that effect entered, upon her showing that the cause had been brought on to trial or that she had filed a counterclaim, and although we may be of the opinion that her affidavit did not authorize the order, and that the order will be of no service to her as she did not propose to file a counterclaim, the order cannot now be reviewed, because it is not appealable. We do not understand that the judgment against Deringer and McDonald was set aside, or that the case was reinstated for a trial as to them.

The appeal from that portion of the first order vacating the order dismissing the action and restoring the action for trial as to Bridget O'Hara is dismissed; and the remainder of the first order, and the second order reversed and the cause remanded.

Mr. Justice SANDERSON did not express any opinion.

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[493] *EDWARD EWALD, AND THOMAS DORLAND v. JOHN C. CORBETT, AND JOHN C. CORBETT, ADMINISTRATOR, AND HENRIETTA CORBETT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM CORBETT, DECEASED, AND VINCENZO ZELNA.

[1] DEED OF MARRIED WOMAN.—The deed of a married woman of her separate property which is not acknowledged in the manner prescribed by the act of April 17th, 1850, defining the rights of husband and wife, is inoperative and void.

SEPARATE AND COMMON PROPERTY.—If a decree of divorce directs an equal division of land, the common property, and a sale of the same, and that if either party purchase at the sale, his or her receipt be taken for the amount his or her due, and the former wife marries again before the sale, and becomes the purchaser, and pays a portion of the money required out of community money, that undivided proportion of the land will be common property which the community money bore to the whole price bid, and the other undivided part will be the wife's separate property.

DEED OF HUSBAND.—If an undivided part of land is common property, and the remaining undivided part is the separate property of the wife, the deed of the husband will convey only that proportion which was community property.

TENANT IN COMMON.—If an undivided portion of land is common property, and the remaining undivided part is the separate property of the wife, the grantee of the husband becomes a tenant in common with the wife or those claiming under her.

EJECTMENT BETWEEN TENANTS IN COMMON.—If the plaintiff and defendant, at the commencement of a suit in ejectment, are tenants in common in the premises, the plaintiff cannot recover possession of the entire premises to the exclusion of the defendants, nor can he recover his undivided part without proof of an ouster.

DEATH OF A PARTY ABATES ACTION.—If, after a decree of divorce which directs a division of the common property, the husband dies, a supplemental decree made after his death, without a revivor as to his heirs, directing a sale of the property and a division of the proceeds, is void as to his heirs. It is not enough that his executors are made parties in his stead.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

After the death of Harman, and before the supplemental decree in the divorce suit was made, his executors were substituted as defendants in his stead, but the children, both of whom were infants, were not made defendants, or in any way brought in. The acknowledgment of the deed of Foley and wife to Brannan and others was correct, except that the notary did not insert the words "without the hearing." The

[1] Approved, McLeran v. Benton, 43 Cal. 472.

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*plaintiffs recovered judgment in the Court below, and [494] the defendants appealed.

The other facts are stated in the opinion of the Court.

R. R. Provines, for Appellants.

On the death of Harman, Sr., the suit between himself and wife *ipso facto* terminated. The parties essential to a divorce suit, and the relation to be affected by it, no longer existed. Nor was there after that any community property to be divided. "The nature of the estate became changed, (4 Cal. 273,) and from community property, in which the wife had no *estate*, but a mere expectancy, (Packard *v.* Arrellanes, 17 Cal. 538,) it was turned into a tenancy in common with other persons, in which the wife's interest was no longer defeasable, or a mere expectancy, but absolute (Beard *v.* Knox, 5 Cal. 256.)" There was, therefore, no longer anything constituting subject-matter for that litigation; the relation of husband and wife and the community of property had both ceased to exist. The cause of action for the division of the community property could no more survive than that for divorce. The action, therefore, inevitably abated. Story Eq. Pl., sec. 356, says: "But if the party so dying be the only plaintiff or only defendant, there will necessarily be an abatement of the suit, if there is no subject of litigation remaining."

The heirs could not be deprived of their property without due process of law (Const. Art. I., sec. 8); and that certainly cannot be regarded as due process of law, in which the parties to be affected were in no way represented and had no opportunity of being heard. (Skinner *v.* Buck, 20 Cal. 256–7.) Not having had the opportunity of being heard, their estate in the land remained as it was before the proceedings for partition and sale were had, wholly unaffected by the decree. (Goodenow *v.* Ewer, 16 Cal. 468–9; Burton *v.* Lies, 21 Cal. 61; Story's Eq. Pl., secs. 328, 329, 331, 354, 354 *a*, and 369; Reynolds *v.* Reynolds, 5 Paige, 161.) The estate did not vest in the executors, but in the devisees, subject only to the lien of the executors for the payment of debts. The executors did *not in that case, and could not, represent [495]

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the heirs or devisees. (Beckett *v.* Selover, 7 Cal. 238–9; Updegraff *v.* Trask, 18 Cal. 459; Burton *v.* Lies, 21 Cal. 61.)

B. S. Brooks, for Respondents.

The first proposition of the appellants' counsel is, that upon the death of Mr. Harman, the suit between himself and wife *ipso facto* terminated. If there was any suit pending, I presume such would be the effect; and the question to be considered is, whether there was any suit pending, and if so, what? A *final judgment* was rendered in the Court of First Instance, on the 24th day of October, 1849, in accordance with the prayer of the complaint decreeing a divorce and partition of assets. That ended the suit. There was no longer any suit pending, for the suit ends with the entry of final judgment: what comes after that is *execution*. The rights of the parties had been tried and determined, and the judgment of the Court had been rendered. The gist of the action was the dissolution of the marriage contract: the division of the assets only followed as an incident or necessary consequence. There was no necessity of reviving the suit, because it had not abated. The District Court had jurisdiction to proceed to execute the judgment without any revival or change of parties. The case of Nagle *v.* Macy, 9 Cal. 429, seems to me to be a case directly in point. In that case, the Supreme Court say:

"It is insisted that the sale is void because made *after the death of the mortgagor*. The decree is not set forth in the record, but it is presumed to be in the regular form, directing a sale of the premises, and application of the proceeds to the payment of the debt, a deposit in Court of any surplus, and execution for any deficiency. *The Court had jurisdiction of the subject and the parties.* The mortgage was a specific lien on the premises, and the *decree directs their sale for its satisfaction.*

"The suit to foreclose a mortgage is in the nature of
[496] a *proceeding *in rem*. (16 Ohio, 141.) *The decree binds the specific property*, and the case is within the reason of the proviso in the one hundred and forty-first section of the act relating to the estates of deceased persons,

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(Comp. Laws, 396,) and we do not think it was necessary to revive the decree by a bill or by a proceeding in the nature of *scire facias*. (Mitford's Ch. Plead. 69.)

"But, admitting the sale was irregularly made, without a revival of the decree it is not void but only voidable. It is good until regularly set aside, and the title of the purchaser under it cannot be impeached in this collateral action for any irregularity in the proceedings. (Jackson *v.* Bartlett, 8 Johns. 361; Jackson *v.* Robins, 16 Id. 576.)"

By the Court, SHAFTER, J.:

Ejectment for lands in San Francisco, they being parcel of a larger tract known as the "Harman Tract." The appeal is from the judgment and order overruling the defendants' motion for a new trial. The only question raised is as to the plaintiffs' title and right of entry.

The case shows, amongst other things, that "Jacob Harman died actually seized and possessed of the demanded premises as community property, on the 3d day of November, 1850, leaving him surviving his wife Elenora Harman, and two children, Mary Ann Harman, aged about seven years, and Jacob Harman, Jr., aged about four years." That Harman left a will, wherein he devised two-thirds of his estate to his said son, and one-third to his said daughter. That letters testamentary duly issued to his executors, Hayes and Corbett, on the 17th of December, 1850. That Mrs. Harman, on the 20th of November, 1850, seventeen days after her husband's death, intermarried with one Michael Foley, and that she died intestate in the year 1860, and that her said son, Jacob Harman, Jr., also died intestate during the same year, leaving neither wife nor descendants. The plaintiff, Ewald, claims the whole of the demanded premises through a *deed executed by Foley and wife to Brannan and [497] others on the 27th of June, 1853; and the defendants claim under Mary Ann Harman as devisee of her father and sole heir at law of her mother and brother.

First—There is no question that Mrs. Foley, at the time she joined with her husband in the deed to Brannan and others, was the owner of at least one-half of the premises in

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her own right; but the plaintiff, Ewald, claims that she owned the whole in severalty by virtue of a deed executed to her by certain Commissioners as purchaser at a sale made by them in pursuance of a decree duly entered in the Court of First Instance, October 24th, 1849, divorcing Mrs. Harman from her then husband, and directing an equal division of the common property; which decree was thereafter supplemented by an order, passed March 12th, 1851, directing the decree to be executed by a sale of the property and division of the proceeds. The defendants dispute the validity of this deed, claiming that nothing passed by it to the purchaser. So far as this appeal is concerned, however, it is not necessary to determine whether Mrs. Foley, at the date of the deed of herself and husband to Brannan and others, owned the premises in severalty as against her children, as claimed by the plaintiff, or only an undivided half thereof, as claimed by the defendants; for the deed referred to was inoperative and void, inasmuch as it was not acknowledged by Mrs. Foley in the manner prescribed by the act defining the rights of husband and wife, passed on the 17th of April, 1850. Though the deed is void considered as a conveyance by the wife of her separate property, it is claimed that inasmuch as the deed of the Commissioners to Mrs. Foley purports to have been made upon a money consideration, the intendment must be, in the absence of all showing to the contrary, that the lot was paid for with money belonging to herself and her husband, Foley, in community; and that the lot is to be considered as the common property of Mr. and Mrs. Foley by consequence, and that the title therefore passed by the deed in
[498] *question considered as the several deed of the husband. The reasoning is unobjectionable, but it remains to be determined whether the assumption of fact upon which it proceeds is borne out by the record. We consider that it is not.

It was ordered by the supplemental decree that in case either of the parties should bid in the premises at the sale, that their receipts for the amounts due them by the decree, should be received by the Commissioners as so much money paid. It appears by the decree that Harman was adjudged to

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be indebted to his wife in the sum of one thousand three hundred and fifty-four dollars "on account of his having had the benefit of the sale and use of the common property to that amount," and the same was made a specific lien on the property. The land was bid in by Mrs. Harman at the sale at four thousand dollars. As one-half of that amount belonged to her as part owner of the land sold, and as she was entitled to one thousand three hundred and fifty-four dollars more as creditor of Harman, having a lien on the property sold, making three thousand three hundred and fifty-four dollars in the whole, it is to be presumed that the Commissioners took "her receipt therefor as so much money paid," according to the direction given in the decree. To that extent, then, it is demonstrated by the record that the bid of the woman was not paid with the money belonging to herself and Foley in community, and it is therefore demonstrated that she took at least three thousand three hundred and fifty-four four thousandths of the property in her own right. Should it be conceded, for the purposes of argument, that the balance of the purchase money (six hundred and forty-six dollars) must be intended to have been paid out of community money by Foley and wife, and that the community therefore owned six hundred and forty-six four thousandths of the land, then the deed to Brannan and others, considered as the deed of Foley, could have passed that fractional interest only to the grantees, and the residue of the title and interest held by Mrs. Foley as her separate property, being unaffected by the deed, must have passed by descent at her death to her daughter *under whom the defendants claim. This view places [499] the plaintiff Ewald and the defendants in the relation of tenants in common at the commencement of the action, and shows that the judgment is erroneous in that, according to its terms, the plaintiffs recover the possession in severalty of the premises demanded to the exclusion of the defendants, and also for the reason that there is no evidence in the case tending to prove that the plaintiffs were ousted by the defendants, considering the parties as standing to each other in the relation of tenants in common.

Second—The supplemental decree in the divorce suit, under

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which the plaintiff claims to be the owner of the whole land sued for, was, in our judgment, null and void as against the heirs at law of Harman. By the death of Harman, the suit abated for all the purposes of further judicial action therein on the subject of partitioning the common property, and the Court had no jurisdiction to adjudge that the property should be sold and the proceeds divided without a revivor as to the heirs. No such revivor was had, and the interests of the heirs were therefore unaffected by the supplemental decree, and the transactions under it.

We have been unable to discover any evidence in the case tending to prove title in the plaintiffs or in either of them under the Van Ness Ordinance or under the Statute of Limitations.

Judgment reversed, and a new trial ordered.

Mr. Justice SANDERSON did not express any opinion.

APPEAL OF THE NORTH BEACH AND MISSION RAILROAD COMPANY IN THE MATTER OF WIDENING KEARNY STREET.[1]

[2] STREET RAILROAD IS PROPERTY.—The interest in the street of a street railroad company authorized by statute to lay down a track in the streets of a city and run cars over it for the conveyance of passengers for hire, is an easement in the land; and the estate of such company in the street is real property.

[500] *STREET RAILROAD, ITS VALUE.—The estate of such street railroad company in the streets of the city is property capable of being enhanced in value by the widening of the street, and by such widening a substantial benefit may accrue to the railroad company.

CONSTRUCTION OF STATUTES.—In construing statutes the object to be accomplished by the act is to be ascertained, and its provisions considered, and so construed, if possible, that all its parts may have effect and operate harmoniously to effectuate that object.

CONSTITUTIONALITY OF ACT FOR WIDENING STREETS.—The act of April 4th, 1864, giving power to the Board of Supervisors of San Francisco to widen streets, etc., does not prescribe a rule for the apportionment of the expenses of the improve-

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[1] Appeal in special cases instanced, Appeal of S. O. Houghton, 42 Cal. 63.

[2] Cited, San Francisco *v.* S. V. W. W., 48 Cal. 534.

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ment for the owners of lots deemed benefited different from that prescribed for railroad corporations benefited, and it is not, therefore, in this respect unconstitutional.

IDEM.—Said rule for the apportionment of expenses is, in both cases, according to the ratio of benefits received.

QUESTIONS CONSIDERED ON APPEAL.—Upon an appeal from a judgment of the County Court confirming the report of Commissioners in apportioning the expenses of widening a street according to the benefits received, it is unnecessary to consider the questions arising upon the proceedings for collecting the assessment made for such expenses, or whether the amount assessed is properly made a lien on property, or whether the mode of enforcing payment of the assessment is constitutional.

ERROR TO BE SHOWN BY RECORD.—Upon an appeal from a judgment of the County Court confirming the report of Commissioners apportioning expenses for widening a street among lot owners and railroad corporations, unless the record shows a different state of facts, the presumption, under the provisions of said act, is that such expenses were apportioned according to the benefits received by each.

IDEM.—All presumptions, under the express provisions of the act, are in favor of the correctness of the action of such Commissioners. It devolves on one objecting to the confirmation of their report to show error.

APPEAL from the County Court, city and county of San Francisco.

The facts of this case are stated in the opinion of the Court.

Some general facts as to the widening of Kearny street are stated in the Appeal of Piper, *post*.

W. W. Crane, Jr.,, for Appellant.

The appellant, the North Beach and Mission Railroad Company, is a corporation having the right to lay down rails in Kearny street, and use them for the purpose of a street railroad for the conveyance of passengers. It has a mere easement or right of way over the street, and is not in any sense the owner or occupant of any houses, lots, or lands upon such *street, or in the district of territory within [501] the city deemed by the Board of Supervisors to be benefited by the widening of Kearny street. (Stat. of 1861, p. 193; Hooker *v.* Utica and Minden T. Co., 12 Wend. 371; People *v.* White, 11 Barb. 26; Brooklyn Central R. R. Co. *v.* Brooklyn City R. R. Co., 33 Barb. 420; Blake *v.* Rich, 34 N. H. 282; Weston *v.* Foster, 7 Met. 297; Giesy *v.* C. W. and Z. R. R. Co., 4 Ohio St. 325.) The act is unconstitutional and void, so far as it affects the appellant, because section seven of the act (Stat. 1863–4, p. 360) authorizes the

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Commissioners of appraisal and assessment to assess such portion of the costs, damages, and expenses upon appellant "as shall to them seem equitable and just," while as to all other persons they can only assess the particular property supposed to be benefited "in proportion to the benefit which each shall be deemed to acquire." The act in question is general in its nature, though only made applicable to the city and county of San Francisco. (Const., Art. I., sec. 11; Pierce *v.* Kimball, 9 Greenl. 56; Burnham *v.* Webster, 5 Mass. 265; Jenkins *v.* Union T. Co., 1 Caines Cas. 93; Bank of Utica *v.* Snieders, 3 Cow. 684; The Commonwealth *v.* Inhabitants of Springfield, 7 Mass. 9; Smith Com. sec. 797; Stat of 1863–4, p. 355, sec. 21.) It is not uniform in its operation. (People *v.* Naglee, 1 Cal. 252; People *v.* Coleman, 4 Cal. 55; Smith *v.* Judge of Twelfth District, 17 Cal. 554; Lathrop *v.* Mills, 19 Cal. 533; French *v.* Teschemaker, 24 Cal. 544.) It in fact levies a general tax upon all the property of the corporation, and is not an "assessment" as defined by this Court. (Emery *v.* S. F. Gas Co., 28 Cal. 346; Emery *v.* Bradford, 29 Cal. 75; Taylor *v.* Palmer, 31 Cal. 240; State *v.* City of Newark, 3 Dutch. 186.) If a tax, it is not uniform nor in proportion to the value of the company's property as ascertained by law. It in effect authorizes the taking of appellant's property without due process of law. The act is also unconstitutional, because the first section authorizes the owners and occupants of the houses, lots, and lands situated within the portion of the city adjudged to be benefited, to [502] *appear before the Board of Supervisors and be heard upon allegations either for or against the proposed improvement, while appellant not being an owner or occupant of land, was prevented by the terms of the act from so appearing. (Stat. 1863–4, p. 348; Doubleday *v.* Newton, 9 How. Pr. 71; Peters *v.* Newkirk, 6 Cow. 103; Chase *v.* Hathaway, 14 Mass. 222; Elmendorff *v.* Harris, 23 Wend. 628.)

There is but little practical difficulty in ascertaining the amount to be imposed upon the property adjoining a local improvement. The Commissioners are first called upon to estimate the benefit that will accrue to the particular parcel of land, and then to assess upon it damages in proportion to

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that benefit, but when these officers propose to make an assessment upon a railroad corporation, it is found impossible to keep within the constitutional limitations. Take the facts in the case at bar, as an illustration. Here is a horse railroad, one terminus at the north end of San Francisco, and the other at the south, while along the surface of the street proposed to be widened, there is laid only, say one-fifth of the entire length of its track. Confessedly, the corporation has no property in or upon the street, except, perhaps, the iron rails over which the cars run. Its right in that particular street is merely a right of way and easement—a right in no way superior to that of every citizen, and only to be distinguished from the right which the owner of every vehicle in the city has because of the particular mode of its use by the railroad corporation. As was held in the case of The Brooklyn Central and Jamaica R. R. Co. *v.* The Brooklyn City R. R. Co., 33 Barb. 420, a horse railroad laid down in the streets of a city and conducted in the usual manner, is not an additional easement or burden imposed upon the land which will entitle the owner of the soil to compensation in damages. And as the Court says:

"The Jamaica Company are not, and never were, the owners of the soil. Their rights were those of passage—a mere easement, and if the laying down of the rails of another *company in the same street, and the running of [503] horse cars thereon, should be deemed and held to be another easement, how could the Jamaica Company complain, so long as its right of passage over the street remained uninterrupted?"

There is, therefore, in Kearny street, upon the line of the improvement, no property to assess. Admitting that the iron rails can be assessed, and sold in case of non-payment, the purchaser thereby acquires no right as against the company to use them upon the street. He must take them up, and the corporation can the next day put down others. In short, the company's franchise is an entirety, the right of way through certain streets between two termini which is not susceptible of severance without the consent of the Legislature and the company. (Arthur *v.* Commercial and R. R. Bank, 9 Sme. &

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M. 394.) These impediments to an assessment within the limitations of the Constitution undoubtedly presented themselves to the minds of the person or persons who drafted the bill, and to the Legislature which passed it; and as it was self-evident that no estimate of benefits could be made, as to the particular section of iron rails within the district that might be adjudged to be benefited, it was sought to avoid the difficulty by permitting the Commissioners to assess upon the corporation at large such sum as to them should appear to be equitable and just. If this be the true solution of the discrimination in the mode of assessment permitted to be made by section seven of the act, then it cannot with propriety be urged that an assessment "in proportion to the benefit," and such a one as "shall seem equitable and just" are the same, or that the terms are convertible, or that the latter has by necessary or reasonable construction the same meaning or limitation as the former.

A. Campbell, for Respondent, the City and County of San Francisco.

A franchise is property. The corporation owns property. For a long distance its track passes through a widened [504] *thoroughfare, on which the travel must be greatly increased, bringing a corresponding increase of profits to the company. It would require a most inflexible rule of law to establish a right of exemption in this property from contributing to an assessment for public improvement which so greatly enhances its value and profits; and we contend that no such rule has been shown. The authorities show and approve of a far higher exercise of power than we here contend for. This very franchise, if required for any great public improvement, can itself be taken, as any other property can be taken. (Peirce on Am. R. R. 151, 152, and cases there cited.) The Court saying, (note to 152,) "We are aware of nothing peculiar to a franchise which can class it higher or render it more sacred than other property. A franchise is property, and nothing more." The whole property of this corporation, and the very franchise itself, is within the territorial limits of the Board of Supervisors, and if they believe

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it to be benefited, they can assess it. (Emery *v.* S. F. Gas Co., 28 Cal. 345; 4 N. Y. 419.) It is said that the act is unconstitutional because the assessment on appellant is not on the same basis as on the owners of the lot, etc.; the one being "just and equitable," the other "in proportion to benefits." We contend that the same rule of assessment is laid down in this case as in all others by the act itself, and no other. That the whole act is to be read to ascertain the true construction of each of its parts. That a single section or fragment of a section cannot be selected and a construction placed on it which ignores the very existence of many other sections, and is inconsistent with the very essence and spirit which pervades every other part of the act.

By the Court, SAWYER, J.:

Proceedings for widening Kearny street, in the city of San Francisco, were taken by the Board of Supervisors of the city and county of San Francisco, under the act of 1864. (Stat. 1864, p. 347.) By the provisions of this act the Board *of Supervisors were authorized to make the improve- [505] ment, and assess the expenses of the work upon the owners and occupants of houses and lands, railroad corporations and companies that might be benefited thereby; and the authority to determine what portions of the city and county, and what railroad corporations and companies would be benefited by the improvements, and which should, therefore, be required to pay the expenses, was also conferred upon the Board. (Secs. 1, 2, 5, and 16.) Under these provisions the district to be benefited was duly determined; and it was also determined that appellant, the proprietor of a street railroad extending through the whole length of that portion of Kearny street to be widened, would be benefited, and should be required to pay a portion of the expenses. The Commissioners appointed to apportion the expenses among the parties deemed benefited, assessed the sum of twenty thousand dollars upon appellant, as its just portion. Objections to the report of the Commissioners, on various grounds, having been made, they were overruled, and the report confirmed by the County Court. This appeal is from the order of confirmation.

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The principal questions to be determined are:

Firstly—Whether the appellant has any property, estate, or interest within the district deemed benefited?

Secondly—If so, whether such estate is capable of being enhanced in value by the proposed widening of Kearny street, and whether by means thereof any substantial benefits can accrue to the company?

Thirdly—Whether the statute prescribes or authorizes a different rule of apportionment of the expenses of the work, with respect to appellant and other corporations and companies, from that applied to owners of lands within the district?

Fourthly—Whether the Commissioners apportioned the amount among the owners of lands and the appellant according to the benefits received by each?

Under the act of April 17th, 1861, (Stat. 1861, p. [506] 193, the *appellant acquired the "right of way thereon to construct and lay down a railway track within the corporate limits of the city and county of San Francisco, and to run horse cars thereon" through certain designated streets, embracing the whole of that portion of Kearny street proposed to be widened, and extending in each direction a considerable distance beyond. It was authorized to lay down a track for its cars to run upon, and to receive five cents fare from each passenger for any distance carried in said cars. This right of way is, at least, an easement in said street. So much is admitted by appellant's counsel. But an easement is property, recognized as such by law—and one of the kind in question, very valuable property. It is an incorporeal hereditament, but it is still a tenement and an interest in the land. "An easement always implies an interest in the land in or over which it is to be enjoyed. A license carries no such interest. The interest of an easement may be a freehold or a chattel one, according to its duration." (Wash. on Eas. 5, par. 5.) "An easement must be an interest in or over the soil." (Per Cresswell, J., in Rowbotham *v.* Wilson, 8 Ellis & B. 157.) "A right of way is an assignable property. It is a real or chattel interest, according to the term of its duration, and the former is well known in the law as that sort

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of real property belonging to the class of incorporeal hereditaments." (Ex parte Coburn, 1 Cow. 570; Heaton *v.* Ferris, 1 John. 146.) It is real property, and it is created by grant. An easement is an estate or interest in land within the Statute of Frauds, requiring contracts affecting real property to be in writing. (Wolfe *v.* Frost, 4 Sand. Ch. 89; Foster *v.* Browning, 4 R. I. 51.) By act of Parliament, (10 Anne,) certain parties were "authorized and empowered at their proper costs and charges to make the river Avon, from the city of Bath down to and within the Millpool or Wearpool, below Harmon Mills and Wear, not exceeding one hundred and fifty yards, navigable, useful, and passable for boats, lighters, and other vessels," and to take certain tolls from those navigating the said portion of said river. (Buckeridge *v.* Ingram, 2 Ves. *Jr. 654.) The interest of the parties in the soil [507] of that portion of the river is but an easement similar to that acquired by the appellant in this case. Yet shares in the improvement were held to be real estate and subject to dower. The Master of the Rolls, citing Lord Coke, says: "And according to that passage, every hereditament which in any degree arises out of land, affects the same, or is exercisable within the same, has all the properties that belong to real estate. * *' * When we come to try the question by the test of that definition, it would be strange to say the right of making all these cuts and erections, and receiving certain tolls, payable by all persons and goods navigating that part of the river, does not savor of realty. It not only does, but it partakes of it. It is not the soil, which I hold would hardly pass to the grantee, but it is a right arising out of the soil. The land itself includes every profit that can be made out of land. Therefore this act cannot be construed to have taken out of the proprietors and given to this corporation the soil; but it has given them the right in and over the soil, and certain rights arising in and out of the soil. * * * I have no difficulty in saying that whenever a perpetual inheritance is granted, which arises out of lands or is in any degree connected with—or, as it is emphatically expressed by Lord Coke, exercisable within it—it is that sort of property the law denominates real, and cannot pass by a will without three wit-

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nesses." (Id. 633.) Having determined the interest to be real estate, he held the shares subject to dower. "The whole estate of the Chesapeake and Ohio Canal Company, at least so far as it consists of the canal itself and its necessary buildings and the fixtures attached to them, must, according to the common law, be regarded as realty." (Binney's Case, 2 Bland Ch. 145.) When a party conveys land bordering upon a navigable river upon which a ferry is established, but excepts therefrom his right to hold and maintain the ferry, the ferry right does not pass, and it is real estate, "and subject to the laws which govern realty." (Bowman *v.* Wathen, 2 McLean, 385, 388.) "The statute of Indiana recognizes the [508] *right of proprietors of lands on the margin of the river, and to none others can ferry rights be granted, and it is supposed that this limits the right to the grantee of the soil. But this construction cannot be sustained. By the statute nothing more could have been intended than to rescue from violation the right of the riparian proprietor. This right is appurtenant to the soil; but he may convey it, and still retain the fee in the land. And, by such conveyance, the grantee holds the right which the statute was designed to protect. He has the use of the soil for a ferry landing and for ferry ways, so far as the public accommodation is concerned, as fully and completely as could be exercised by the grantee of the soil; but for no other purposes has he a right to enter upon the soil. Now, it must be presumed that the right thus possessed is as much within the policy of the statute as if it were a fee simple in the soil. Indeed, it is within the letter of the statute; for the grantee of such a right may, in the strictest sense, be considered for all the purposes of the ferry, 'the proprietor of the land on the margin of the river.' This right, as before remarked, is real estate. It descends to heirs as such, is subject to dower, and to all the incidents of real property." (Id. 389, 390.)

The statutes of Rhode Island provide that "the assessors of taxes in the several towns, in assessing taxes for real estate, may assess the same either upon the owners of the real estate or upon the persons who hold or occupy the same." (Providence Gas Co. *v.* Thurber, 2 R. I. 21.) Under this provision,

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the Providence Gas Company was assessed for its gas pipes laid in the streets of the city, valued as real estate at fifty thousand dollars. (Id. 15.) The gas pipes having been permanently attached to the soil and united to the easement of the company in the land, were held to become a part of the realty and to be properly taxed as real estate. The Court say: "If these pipes had been laid in the land of an individual by parol license, they would not become fixtures thereby. But if the owner had granted by deed the right in fee to lay pipes through his land, they would be fixtures, because the *annexation would be under legal title." (Id. 23.) [509] After some further discussion it is said: "What, then, is the nature of the right which plaintiffs take under their charter? We think, when exercised, it is an easement—an incoporeal hereditament, like the right of a railroad company to build and occupy their road, or a canal company their canal, under the provisions in their charter which grant the power to take the land upon rendering compensation to the owners." (Id. 24.) And again: "But the tax has not been assessed upon the plaintiffs as occupants of the land by their pipes, etc., but upon their pipes as real estate. And these pipes, being annexed to the freehold, and the gas company having an easement in fee, or a right so to annex and use them, we think they are fixtures, and rightfully assessed as real estate." (Id. 26; see also cases cited.) So, also, the Providence and Worcester Railroad Company owned "in fee an easement in certain real estate in said town, said estate so owned by said company being the location, sleepers, rails, and bridges, etc., of the P. and W. Railroad," lying within the limits of the charter. Under the same act this property was assessed as real estate, and the question was, whether it was liable to be assessed. The Court say: "We have no doubt the easement of the plaintiffs and their rails, sleepers, bridges, etc., are real estate, and subject to taxation within the decision of the Court in the case of Providence Gas Co. *v.* Thurber, unless exempted by sec. 28," etc. The property was held not to be exempt under that section, and properly taxed as real estate. (Prov. and W. R. R. Co. *v.* Wright, 2 R. I. 462.) So in New York, under the general statutes requiring "all real and per-

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sonal estate" to be assessed for taxation at its full and true value, land occupied by the road, the superstructure and other fixtures are taxed as real estate, in all respects like other lands. (Alb. and Sch. R. R. Co. *v.* Osborn, 12 Barb. 225; Alb. and West Stockbridge R. R. Co. *v.* Town of Canaan, 16 Id. 247.) The same is true of Illinois. (Sand. and Mor. R. R. Co. *v.* County of Morgan, 14 Ill. 166.)

[510] *The question in this case, also, has reference to a species of burdens levied for local purposes under the taxing power.

A turnpike company has but an easement in the soil, yet it has an estate, a property in it, which can no more be taken for the use of a railroad without compensation than the interest in the soil held by the owner of the fee. When a railroad crosses a turnpike, compensation must be made to the turnpike company. In a case of assessment for damages resulting from the crossing of a turnpike by a railroad, Mr. Justice Harris speaks of the interest of the former as real estate. He says: "So far as the railroad company had occasion to take the real estate of the turnpike company so far they were bound to make compensation." (Troy and B. R. Co. *v.* North Tpk. Co., 16 Barb. 106.) So a railroad company which exclusively uses the road by cars propelled by steam cannot appropriate a public highway, as a part of its road, without making compensation to the owner of the fee of the land upon which the highway is located. This is imposing a new burden upon it beyond the easement already acquired by the public. A new estate is to be carved out, which can only be acquired by the railroad company by contract with the owner of the fee, or by condemnation and payment of compensation under the right of eminent domain. (Williams *v.* N. Y. C. R. Co., 16 N. Y. 100; Mahon *v.* N. Y. Cent. R. R. Co., 24 N. Y. 659; Wager *v.* Troy Un. R. Co., 25 N. Y. 526; Waterloo *v.* Aub. R. R. Co., 3 Hill, 569.) In the first case the Court says: "The right of the public in a highway is an easement and one that is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road also an easement? This cannot be denied, nor that the latter easement is enjoyed, not by the public at large, but by

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a corporation, because it will not be pretended that every man would have a right to go and lay down timbers and his iron rails and make a railroad upon a highway. Here, then, are two easements, one vested in the public and the other in the railroad company. These easements are property, and that of the railroad company is *valuable." (16 N. Y. [511] 108.) And it is property that must be acquired by purchase—by contract with the owners of the fee, or by making compensation in the mode prescribed by law in the exercise of the right of eminent domain. The sovereign power has no authority to convey it as a part of the franchise. By virtue of its franchise it may be endowed by the sovereign power with a capacity to acquire the easement, hold property, and exercise the functions with which it is endowed; but it is beyond the power of the Government itself to endow it with the easement—confer upon it the property—the interest or estate in the lands not owned or controlled by the sovereign power. That interest is property as distinct from the franchise, and must come through purchase and payment of the consideration like any other property. So, also, in a recent case in New York, in which the power of the corporate authorities of New York city to authorize certain parties to construct a street railroad in Broadway, the character of the rights and interests of street railroad companies was involved. In speaking of the resolution authorizing the parties to construct the road, the Court say: "Upon its acceptance, (if valid,) it became a contract between two parties, binding each to the observance of all its provisions. It was something more than a mere executory contract between the parties. *It amounted also to an immediate grant of an interest, and it would seem of a freehold interest, in the soil of the street to the defendants. The rails, when laid, would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns.* * * * The title to the rails, when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are therefore granted to the defendants by the resolution. The exclusive use of the rails, when laid for the purpose for which they were designed, would also, as I think,

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belong to the defendants. Other people might drive across them, and to some extent along them, with ordinary carriages, but they would have no right to run cars upon them [512] for their own convenience or *profit. Any use which the public could have of them, not exercised through the defendants' franchise, would depend upon the fact that the rails would not entirely exclude from the ground they might occupy the character of a public street." (Milhau *v.* Sharp, 27 N. Y. 620–21.) "The resolution is therefore void, for the reasons that it purports to create a franchise which the Common Council had no power to create: *to vest in the defendants an exclusive interest in the streets which the Common Council had no power to convey;* and to divest the corporation of the exclusive control over the street which has been given to it as a trust for the use of the public, and which it is not authorized to relinquish." (Id. 622.)

Thus it appears that the appellant has acquired an interest in the soil in Kearny street; that it consists in the location of the road in the street, its right to lay down rails and attach them to the soil, and to run its cars over them for profit; its right to the exclusive use of them and the streets, so far as is necessary for the purpose, in the mode prescribed; that this interest is property—an interest in the land—and that it is real estate, and the rails thus laid down, attached to the soil and annexed to the easement became themselves a part of the land—of the estate of the company—and that, in those States where no special provision is made for taxing this species of property in a different mode, it is assessed as real estate in the same manner, and upon the same principles, as land—as if the company owned the land itself upon which the track is laid to the extent of its interest in it. The interest is local—fixed to the particular land, the particular street—and cannot be enjoyed beyond or independent of that fixed locality. It is as immovably established on the particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can no more be enjoyed away and apart from its fixed locality than the estate in the other; and the right of the street railroad company to the exclusive control and enjoyment of its estate in the soil of the street to

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the full extent of that estate, is as perfect as the right of the *lessee or owner of the lot fronting on the same [513] street to control and enjoy his estate. The several estates are substantially of the same kind, and are of equal dignity before the law, but one is larger, more extensive than the other. Practically, they differ only in the quantity of interest, not in quality.

Secondly—The first point being established, is the estate capable of being enhanced in value by the proposed improvement; and by means thereof, can any substantial benefit accrue to the appellant? Conceding this question to be a proper one for this Court to determine, it seems clear that it must receive an affirmative answer. The business of the appellant is the transportation of passengers for hire, in its cars, over the street railroad running through the entire portion of the street to be widened, from one part of the city to the other. These passengers are taken up at all points along the line. Its profits depend entirely upon the amount of travel over the road. As the travel in its cars increases or diminishes, the profits of the company increase or diminish; and as the profits increase or diminish the value of the easement—the estate of the company in the street traversed by its cars, and upon which its ability to carry and thereby acquire any profits at all depends—increases or diminishes. Whatever change in any particular street, therefore, will increase or diminish the travel in its cars, must, directly, in the same ratio, increase or diminish the value of its easement—its estate in the particular street in which the change is made, and upon which such increase or diminution depends. It is contemplated by the projectors, that the widening of Kearny street into the most spacious avenue of the city running in that direction will make it the great thoroughfare through the city from north to south—the direction of the greatest travel—and greatly increase the business and enhance the value of property on that street. It must be presumed that the results contemplated, to a considerable extent at least, are likely to be realized; otherwise there would be nothing to justify the city and the property holders of the district to be assessed in *incurring the great expense of the improvement. [514]

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But whether the result anticipated will be realized is not a question for us. The jurisdiction and the duty to determine whether the public wants demanded, and whether the benefits likely to result would be sufficient to justify the expenditure, was devolved by law, under prescribed restrictions, upon the Board of Supervisors. That question they have determined. If the benefits anticipated accrue, it will be owing to the fact that the increased facilities for travel and business on the widened street will attract a much larger number of people into that thoroughfare. The larger the population of a city, the more business of one kind or another is likely ordinarily to be transacted; and the larger the number of people travelling through a business street, the larger the number likely to stop and do business on that street. The more business there is transacted on a given street, the more desirable a location on the street will be, and the greater the rent such a location will command; and the greater the rent a given lot will command, or the greater profit its use will afford, the more valuable will the lot, or any estate in it be. The same principles must operate, and in precisely the same manner, to affect the value of the estate of the appellant in its easement on Kearny street. The more people travelling and frequenting Kearny street, the greater the number likely to ride in the company's cars, and the greater its profits are likely to be—the more valuable the use of the street, and consequently the more valuable appellant's estate in it upon which its profits depend. And this enhanced value—these benefits—as clearly accrue through its estate in the location in the street, as the benefits accruing to the owners of lots bordering on the street result from their estate in the particular locality. Without this easement in the street the increased profits could not accrue. The appellant then has an estate in the street, in respect of which substantial benefits will, or at least are likely to accrue from the contemplated improvement; and it is liable to be assessed for these benefits in the same manner as the owners of other property in respect of which they in like manner receive benefits.

[515] *Thirdly—Does the statute prescribe or authorize a different rule of apportionment of the expenses of the

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work with respect to appellant and other companies and corporations, from that applied to owners of land within the district deemed benefited?

Appellant insists that it does: that the owners of lands are to be assessed in the ratio of benefits received, while companies like the appellant are to be assessed arbitrarily in the discretion of the Commissioners, as to them shall seem equitable and just, without reference to benefits likely to accrue, and that the act is, in this particular, unconstitutional. In construing statutes, the object to be accomplished by the act is to be ascertained, and its provisions considered, and so construed, if possible, that all its parts may have effect and operate harmoniously to effectuate that object. In view of this principle, let us examine the statute under which this proceeding is had. Section one authorizes the Board of Supervisors to open, widen, and improve streets, etc., and take private lands for the purpose, etc., and provides that for that purpose "they shall enter in their minutes a resolution or ordinance declaring such determination, containing a description of the lands deemed necessary, and also of that part or portion of said city and county, and those railroad companies and corporations, if any, which they judge will be benefited by said improvement, and which ought to bear the expense thereof." (Stat. 1864, p. 347.) After an estimate of the expense has been made and reported by the proper officers, if the Board determine to proceed with the improvement, they are to pass an ordinance, "declaring such determination, containing a description of the land deemed necessary to be taken therefor, and also that portion of the said city and county, and those railroad companies and corporations, if any, which will be benefited by said improvement, and upon which the expense thereof is to be assessed." (Id. 348, sec. 2.)

If all the required lands are purchased, and the whole city and county is deemed benefited, and the expense directed to be assessed on the whole city and county, then the expenses *are to be assessed upon all the taxable prop- [516] erty of the city and county, and are to be included in the general assessment roll like other taxes. (Sec. 3.) The fourth section directs a map to be made, designating "the

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part and portion of the said city and county, the corporations and companies as aforesaid, declared to be benefited by the same and to be assessed therefor," etc.

If it be assessed upon a part of said city, etc., a notice designating "the portion of said city and county, corporations and companies so declared to be benefited," stating that the expense, etc., "will be apportioned and assessed upon the owners and occupants of houses, lots, and other real estate, corporations and companies to be benefited thereby, is to be served upon each of aforesaid corporations, companies, owners," etc. (Sec. 5.) Commissioners are to be appointed, sworn, etc., to appraise the damages sustained by taking lands, etc., "and assess the whole amount of such damages upon all the owners and occupants of lands and houses within the territory deemed by the resolution of the Board of Supervisors to be benefited by such improvement, as near as may be in proportion to the benefits which each shall be deemed to acquire by the making thereof;" provided that when any street occupied or used by the track of a railroad company is to be altered or widened, "it shall be lawful for the Commissioners appointed as in this act provided, and whose duty it may be to make a just and equitable assessment of the whole amount of costs, damages, and expenses of such altering or widening among the owners of all the lands and real estate intended to be benefited thereby, to assess such portions of such costs and damages and expenses upon the corporation or company owning or using said railroad track as shall to them seem equitable and just, and such assessment shall be a lien," etc. (Sec. 7.) And the sixteenth section provides that "the expenses of any public improvement herein authorized shall be defrayed by assessment on the owners and occupants of houses and lands, corporations and companies, that may be benefited thereby." These are the only provisions [517] affecting *the question now in hand. Now, what is the object, the leading idea, running through all these provisions with reference to the payment of the expenses of improvements of the kind indicated? Manifestly that those who receive the benefits shall pay the expenses of the work. Benefits received is the basis, and the only basis, upon which the

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assessment for expenses is to rest, and be apportioned. If the improvement is of so important and beneficial a character to the whole city and county as in the opinion of the Board of Supervisors it ought to be a charge upon the city and county, all the taxable property in the county is to be assessed, and the assessment is to go upon the general assessment roll of the city and county. But if the benefits are mostly local, and limited to but a portion, then the expenses are to be assessed upon the owners and occupants of the lands, and such railroad corporations and companies as are deemed benefited, and none other. A provision for an assessment upon the owners of lands, corporations, and companies benefited, necessarily implies that it shall be in the ratio of the benefits. No other mode of apportionment of assessment for benefits would be "equitable and just." Whenever, throughout the act, owners of lands and corporations are mentioned in the same paragraph in connection with the terms "assessment" and "benefits," these terms apply to both alike; and in the proviso of the seventh section, where owners of land and companies are mentioned again in the same paragraph, and the phraseology is changed, the terms "just" and "equitable" are used with reference to both. "It shall be lawful for the Commissioners * * * whose duty it may be to make a just and equitable assessment [not in terms an assessment in proportion to benefits] * * * among the owners of all lands and real estate intended to be benefited thereby, to assess such portions of such costs * * * upon the corporation or company owning or using said railroad track as shall to them seem just and equitable." The Legislature, in the first part of this provision, speaks of the duty of the Commissioners "to make a just and equitable assessment" among the owners of lands to be benfited. But *it is nowhere else provided [518] in the act in express terms, that they shall make a "just and equitable" assessment among the owners of the lands to be benefited, but in the body of the section preceding the proviso, it is expressly provided that they "shall apportion and assess the whole amount * * * upon the owners and occupants of lands and houses * * * as near as may be in proportion to the benefit which each shall be

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deemed to acquire by the making thereof." This is the rule of apportionment expressly prescribed, and yet in the proviso to the same section the Legislature speaks of "the Commissioners, whose duty it may be to make a just and equitable assessment among the owners of all the lands and real estate intended to be benefited thereby." The duty is prescribed in the body of the section in the language before cited. These two clauses cannot, therefore, be construed as indicating two different principles of assessment to be applied to the same parties, the owners of lands; for that would make them inconsistent. The two forms of expression, then, were used by the Legislature as synonymous, and that body has itself defined the terms "just and equitable," as used in the act, to be "as near as may be in proportion to the benefits which each shall be deemed to acquire by the making" of the improvement; and having defined these terms, there is no reason to suppose that the same words transposed—"equitable and just"—used in the same paragraph, in connection with the same subject-matter, as applied to the owner of a street railroad, were used in a different sense, and a sense, too, not in harmony with the general idea and object so repeatedly and prominently presented in all the other provisions of the act. We think, upon a reasonable construction of the act, the only principle of apportionment authorized is according to the ratio of the benefits received—that this principle of apportionment applies to railroad corporations and companies as well as to owners of lands deemed benefited. The principle of apportionment prescribed is, therefore, uniform and not liable to the constitutional objection suggested.

It will be observed that I have thus far confined the [519] *argument to the question as to whether the statute prescribes a uniform rule of apportioning the amount to be raised from the owners of the property benefited—whether the proper principle is adopted by the statute for ascertaining the proper amount which should be paid by the North Beach and Mission Railroad Company, appellant in this proceeding. The only questions necessary to be determined on this appeal are, whether the appellant is liable to be assessed at all, and if so, whether the proper amount has

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been apportioned to it. We have in this case nothing to do with the remedy for collecting the amount which it ought to pay—whether it is too broad or too narrow, or whether any means at all have been provided for enforcing payment, is not a question in this case. The clause of section seven, that such "assessment shall be a lien upon any property of said corporation or company in said city and county, and may also be enforced in the same manner as the assessment upon owners of lands and real estate intended to be benefited thereby," has no bearing upon any question involved in this appeal, and it is unnecessary to discuss the suggestions made in reference to it. This has reference to the remedy. It may be conceded, for the purpose of our decision, that it is incompetent for the Legislature to make the amount a lien upon the personal property of appellant, or any of its property outside of the district determined to be benefited, and that the Legislature has failed to sufficiently provide for enforcing payment against the franchise of the company so far as it embraces any rights or interests in Kearny street; for these questions only go to the remedy, and do not in any way affect the rule or principle prescribed by which the amount which the company ought to pay is to be ascertained. If the Legislature has adopted an improper remedy, or fails to make any valid provision, adequate or otherwise, to enforce payment of the amount properly assessed, or imposed a lien upon property exempt under the Constitution, it may remedy the defect or failure by further legislation on that point; but it in no way affects the question as to the amount which ought to be paid involved on this appeal. This *must be so from the [520] nature of things, and so are the authorities, so far as any bearing upon the point have fallen under our notice. A question involving a similar principle arose in People *v.* Lawrence, 36 Barb. 181, where an assessment of the sum of one hundred and twenty-five thousand dollars was made upon the property holders of the district benefited, to pay the Long Island Railroad Company for a surrender of its right to use steam on the portion of its road in the said district. The Court say: "This assessment may be valid, although the machinery intended for its collection may fail. * * * But an

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objection, constitutional or other, to the means which the act gives for the collection of the assessment, is not necessarily an objection to the assessment itself. We should not reverse the proceedings of the Commissioners if the statute provided no mode for the collection of their assessment, and we cannot be asked to do so because it gives a remedy for that purpose which is ineffectual, or even unconstitutional." (181.) So here the Commissioners only determined the amounts—the portion of the whole—which ought to be paid respectively by the appellant and the several owners of land benefited. They have nothing to do with liens, the means of enforcing payment, or with consequences; and all we can do is to review their action and the order of the County Court confirming it, and if no error is found in the apportionment, the order must be affirmed.

Fourthly—Did the Commissioners apportion the amount among the owners of lands and the appellant according to the benefits received by each?

There is nothing in the record to show—and we have no reason to suppose—they did not. The act, as we have seen, upon a reasonable and proper construction, requires the apportionment to be so made. Such, we think, would be the construction that practical business men, at all competent to perform the duties, would put upon it; and we have no doubt that the Commissioners so construed it. The County Court so construed the act, as the record clearly shows; and the seventh section requires the Commissioners "in case [521] of *any controversy, or doubt respecting any legal principle involved in their proceedings, or in any determination to be made by them," to apply to the County Court for instructions. If they had any doubt—and they could scarcely have adopted a different principle of apportionment with respect to appellant, without some doubt—they must have called upon the County Court, and have received instructions in accordance with the construction given the statute by the County Court and herein approved by us. These proceedings were under the supervision of the County Court and a part of the proceedings of the Court. Besides, we cannot presume that the Commissioners gave an erroneous con-

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struction to the act and adopted a principle different from that prescribed. We might as well presume that they adopted some principle other than that prescribed in apportioning the amounts upon the owners of lands. Error must be affirmatively shown by the party relying upon it. The County Court and the Commissioners had jurisdiction to perform the various duties assigned to them respectively by the provisions of the act; and section twenty-one provides that "all presumptions attaching to the proceedings of courts of general jurisdiction shall apply to the proceedings had in the said County Court under the provisions of this act." "Such jurisdiction shall be deemed to attach upon the filing in the said County Court of the proceedings, maps, affidavits, and certificates mentioned in the sixth section," etc. (Sec. 21.) All subsequent proceedings, including appointment of Commissioners, their acts performed, and report made under the direction and supervision of the Court, are "proceedings had in said County Court under the provisions of this act," and are embraced in the presumptions referred to in the clause cited. This being so, as in courts of general jurisdiction, the presumptions are all in favor of the validity of the proceedings—that every necessary act was correctly and legally performed. The statute nowhere requires the Commissioners to expressly or affirmatively state that they apportioned the amounts according to the benefits. *The provision is: "They [522] shall also in such report specify, in the form prescribed by law for assessment rolls in said city and county of San Francisco, the sums of money which each and every owner or occupant of houses and lands, corporation or company deemed to be benefited by such improvement, whether known or unknown, as aforesaid, should pay toward the expenses of making the same," etc. (Sec. 8.) The amount to be paid—not the mode of arriving at the amount—is to be specified. The mode is prescribed by law, and is already known, and it is presumed that that mode will be followed. The report of the Commissioners of the amount assessed upon owners of lands, in the several appeals to this Court in the same proceedings, shows the amount assessed upon each owner, but does not state expressly that it was apportioned according to the ben-

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efits; and we might as well presume in those cases, as in this, that they adopted some other principle than that prescribed by statute. If a wrong principle was adopted, the appellant had an opportunity to show it on his objections to the report before the County Court, and to "take proof in relation thereto." (Sec. 9.) His counsel made the objection, but offered no proof to sustain it, and undoubtedly for the reason that there was no foundation for the objection. His only hope, doubtless, was in establishing a different construction of the statute—the principal point argued here. However this may be, the presumptions are in favor of the correct action of the Court and Commissioners, and the validity of the proceedings. The burden of affirmatively showing that some error vitiating the apportionment intervened, rests upon the appellant, and he has presented nothing in the record showing error in this respect.

But one case (State *v.* City of Newark, 3 Dutch. 186) has been called to our attention that appears in any respect to conflict with the views here expressed, and the conflict is apparent, only, rather than real; for the case is clearly distinguishable. By the provisions of an act to incorporate the city of Newark, passed in 1836, the Common Council was authorized to open, widen, and improve streets and assess the
[523] *expenses "among the owners and occupants of all the houses and lots intended to be benefited thereby, in proportion, as nearly as may be, to the advantages each shall be deemed to acquire," to be assessed by five freeholders appoimted by the Common Council. (Elmer's Dig. 656.) Nothing is said about railroads or railroad companies. In 1854 a supplementary act was passed containing a single section relating to railroads alone, which provides that whenever any street in Newark, occupied or used by the track of any railroad is altered or widened for convenience of public travel under the act to incorporate the city, it should be lawful for the Commissioners appointed under that act "to assess such portion of said damages and expenses upon the corporation or company owning or using said railroad track, as to them should seem equitable and just," etc. (Laws, N. J., 1854, p. 395.)

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The section is in very nearly the same language as the second proviso to the seventh section of our act; but it does not stand in the same relations to other provisions making benefits received the basis of apportionment, as the proviso in our act does. This section authorizes a portion of the expenses to be assessed upon the company owning the road, the track of which is laid in the portion of the street widened, whether the company is benefited or not. There is nothing in the original or supplemental act directing a portion of the expenses to be assessed upon such railroad companies as are benefited. This is not the test, but the fact of the track being laid in the street widened is the test, and the only test, by which it is to be determined whether the company shall be assessed or not. Such is the language of the act, and so, whether right or wrong, the Supreme Court of New Jersey construe it. Our act is different. Owners of houses and lots and owners of railroads are mentioned together throughout the act. Railroad companies are not to be assessed at all unless benefited. This is the test. The first step to be taken by the Board of Supervisors is to ascertain and determine by resolution what portions of the city and what "railroad companies and corporations, if any," will be benefited. (Secs. 1, 2, 5, *etc.) And [524] "the expense of any public improvement herein authorized shall be defrayed by assessment on the owners and occupants of houses and lands, corporations and companies, that may be benefited." (Sec. 16.) Benefits constitute the test.

In The State *v.* Newark, an assessment to pay the expense of widening Market street was made upon the owners of the lots benefited, and on the New Jersey Railroad and Transportation Company. Of the amount to be raised, one thousand two hundred fifty dollars for houses and lots owned by the railroad company, and eighteen thousand dollars on account of the railroad track laid in the street and used by the company. The assessment as to the houses and lots was affirmed, and that as to the railroad track held invalid. The railroad in that case was not a street railroad for the accommodation of city passengers, but a railroad for the transportation of passengers

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and freight between distant cities by means of trains of cars propelled by steam. It may well be that such a railroad, or the easement and estate held by the company in the street, would not be enhanced in value, or its profits increased by the widening of the streets of a town or city which it enters, or through which it passes, and that the corporation as the owner of such road would not be benefited by the improvement. Indeed, it is difficult to see how it could be benefited in any sense other than any individual who has occasion to pass through the street. It is very different from a street railroad designed to take up passengers at every point on its route, the profits of which depend, wholly or largely, upon the number of persons who frequent the street, and by reason thereof have occasion to use its cars. And it was on the ground that the railroad could not by possibility be benefited, and was not required by the act of New Jersey to be benefited, in order to subject it to assessment, and was not in fact assessed by the Commissioners according to benefits, that the portion assessed upon the company in respect of the road was held invalid. The Chief Justice says: "The assessment is not required to be made with any regard to the benefit the improve-
[525] ment may *confer upon the company. From all that appears, the assessment may have been graduated by a regard to the ability of the company to pay—to the value of its stock—or to the amount of travel that passed through the street upon the railroad. It does not appear that the improvement added any value to the road itself, or to the stock of the company." (3 Dutch. 191.) After further argument to show that the company could not be benefited, the Chief Justice adds: "It is made for a public purpose, and confers no special benefits upon the property of the company." The other opinion in the case adopts the same general line of argument, and after stating that the Commissioners did not find the company to be benefited, closes that branch of the case as follows: "In any other light than as a tax for the purposes of the municipal government, this assessment is simply the taking of a sum of money from the railroad company for public use, without even the pretence of compensation. As a tax it is a burden, and does not come within the reason of the

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Patterson Case, or of the other cases like it [that is to say, it is not assessed for benefits, or on any other recognized principles of apportionment]; and, in either aspect, it is an exercise of power forbidden by the Constitution." (Id. 195.) Thus the decision is based on the ground that the statute of New Jersey did not require the assessment on the railroad company to be made on the basis of benefits; that it was not in this instance so assessed in fact; that the company was not and could not be benefited by the work; that regarded as a tax it was not apportioned on any admissible principle; or regarded as taking private property for public use, it was without compensation.

In the present case, the statute requires the expenses to be assessed upon the owners of houses and lands, and railroad companies to be benefited. The record affirmatively shows that the Board of Supervisors determined that the appellant would be benefited, and it is manifest that it may be very largely benefited by the improvement. The assessment, as we have held, must be regarded as made according to benefits, *and the case is clearly distinguishable from [526] the one in New Jersey.

Lastly—Because the act provides that the assessment shall be a lien upon all the property of the corporation in the city and county of San Francisco, it is said that this is in effect levying a tax upon all the property of the corporation, whether in the district benefited or not, and makes it general taxation and not assessments for benefits, and for this reason the act is unconstitutional and void. We have before seen that it is unnecessary to determine the question raised on this appeal, for the reason that it has nothing to do with the amount that ought to be paid by the company, but only relates to the remedy for collecting it. The remedy may be too broad or too narrow, inadequate, or even unconstitutional in whole or in part, and yet the apportionment be valid—the amount that ought properly to be paid, properly determined.

But if it were necessary to determine the question now, I am clearly of opinion that the objection is untenable, for reasons which will be found fully stated in my opinion in

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Taylor *v.* Palmer, 31 Cal. 666, and which it is unnecessary to repeat here.

The points considered are the ones mainly relied on by appellant to reverse the order of confirmation. There are some other points of minor importance made in the briefs, but we think they are untenable, for reasons sufficiently stated in the opinion of the County Judge, and we will not extend this opinion by discussing them further.

We think the order confirming the report of the Commissioners should be affirmed, and it is so ordered.

Mr. Justice SANDERSON delivered the following dissenting opinion, in which Mr. Justice RHODES concurred:

The principal question made in this case relates to the constitutionality of the act under which it arose: Is it repugnant to the eleventh section of the first article of the Constitution, which provides that "all laws of a general nature shall [527] have *a uniform operation?" I think it is, and am therefore of the opinion that the entire act is null and void, and consequently that all the proceedings which have been taken under it, for the purpose of improving Kearny street, are also null and void.

That the statute is a general law, within the meaning of that clause of the Constitution to which I have referred, is not disputed. (Smith *v.* The Judge of the Twelfth Judicial District, 17 Cal. 554; French *v.* Teschemaker, 24 Cal. 518; Bourland *v.* Hildreth, 26 Cal. 257.) Being a general law, does it operate uniformly upon all classes of persons upon whom it operates at all?

There are two classes upon which it operates—one consisting of the owners and occupants of houses, lots, and lands, and the other of railroad companies or corporations. (Sec. 7.) Does it operate in the same manner upon the latter as upon the former? I think not.

As to the former, it provides that the Board of Supervisors shall designate what houses, lots, and lands, in their judgment, will be benefited by the improvement of the street, and that the owners and occupants thereof shall be taxed, for the

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purpose of paying the cost of the improvement, in proportion to the *benefit* which will result to their houses, lots, and lands from the improvement. (Sec. 7.) And that when thus ascertained, such tax shall become a lien upon the houses, lots, and lands so designated. (Sec. 15, subd. 5.)

As to the latter, it provides that the Board of Supervisors shall designate what railroad corporations will be benefited, and that the corporations so designated shall be taxed such proportion of the cost as shall seem *equitable and just* to the Commissioners of appraisement and assessment, (sec. 7,) and that such tax, when ascertained, shall be a lien upon all property belonging to them in the city and county of San Francisco. (Id.)

It appears obvious to me from the bare statement of the manner in which the statute operates upon these different classes that its operation is not the same, either in respect to *the rule of levy and appraisement, or the [528] lien and collection of the tax—the two principal particulars in which the statute operates.

I. In respect to the owners of lands, the mode of proceeding, in respect to the levy and apportionment of the tax, is clearly and explicitly defined—nothing is left to the discretion of the Commissioners. They are directed to look only to the property, designated by the Board of Supervisors, as the foundation of their apportionment, and are instructed to inquire and ascertain how much each parcel will be benefited by the improvement, and to tax the owner in proportion to the benefit so ascertained. In no respect is the foundation of the apportionment, or the mode of proceeding, left to their discretion. It is not so in the case of railroad corporations, but directly the reverse. Between the two modes there is all the difference that there is between a rule and no rule—no discretion and absolute discretion. The Board of Supervisors is directed to name such railroad corporations as will be benefited, and the Commissioners are merely directed to tax them such an amount as they may think "equitable and just." Instead of being restricted to a particular basis, in some form of property, as in the case of the owners of land, for the purpose of estimating the benefits which will accrue to the corpo-

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ration, and then directed to tax it in proportion to those benefits, the Commissioners are allowed entire freedom to select their own basis of benefit, or none at all, and then to tax the corporation whatever they may think proper, or according to their uninstructed notions of what is "equitable and just." In other words, in the one case the Legislature prescribes the rule of action, and in the other the Commissioners are left to pursue their own course.

II. In the case of the owners of lands the tax is made a lien only upon the property which is benefited. In the case of railroad corporations it is made a lien upon all the property of the corporation in the city and county of San Francisco, whether benefited or not. Under the rule in Taylor *v.* Palmer, 31 Cal. 240, only such property as will be bene-
[529] fited can be *taken to pay the tax. It results then that the property designated as benefited, in the case of the owners of land, can be taken to pay the tax, and that they can be made to pay, while in the case of railroad corporations, no property having been designated as benefited, none can be taken, and therefore the railroad companies cannot be made to pay.

To repeat: In the one case the Board of Supervisors is required to designate the property which will be benefited, and in the other it is not. In the one case, the Commissioners are told what property to take as the basis of their estimate of benefit; in the other, they are not, but are left to choose for themselves. In the one case, they are told to tax in proportion to the benefit which will accrue to certain property; in the other, they are not so restricted, but are allowed the largest liberty and told to do whatever their uneducated notions of equity and justice may dictate. In the one case, the tax is made a lien upon certain property, which is designated, and can be collected; in the other, it is made a lien upon property which is not benefited and therefore cannot be collected, (Taylor *v.* Palmer,) for the only property of the railroad corporations which is benefited (as held by my associates) is its easement or franchise, and that cannot be sold, except with the consent of the Legislature, which is not given. (Wood *v.* Truckee Turnpike Co., 24 Cal. 474.)

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Such is my reading of the statute. To read it the other way would be to transpose one of the most salutary maxims by which Courts are guided—*jus dicere non jus dare.*

For these reasons, I am compelled to dissent from the various conclusions reached by a majority of the Court in the several appeals which have been taken in the course of these proceedings. In my judgment, the entire action of the city government in the matter of widening Kearny street should be set aside as being null and void.

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*PIPER'S APPEAL IN THE MATTER OF WIDENING KEARNY STREET.[1] [530]

NEW TRIAL IN CASE OF REPORT OF COMMISSIONERS.—The rule that a verdict will not be set aside and a new trial granted, on the ground that it is contrary to the evidence, where there is a substantial conflict in the same, applies to the report of the Commissioners appointed to assess the damages and estimate the benefits resulting from the widening of a street, and to the judgment of a Court affirming the report, where the Commissioners make a personal inspection of the premises, with even greater force than to verdicts of juries, or findings of a Court based on evidence alone.

ESTIMATE OF BENEFITS RESULTING FROM WIDENING STREET.—It is not erroneous for Commissioners appointed to estimate the benefits that will result to property holders by the widening of a street, to assess the same upon the hypothesis that all lots on the street will be benefited in the ratio of their values, provided there is evidence warranting such a conclusion.

ASSESSMENTS ON LOT OWNERS FOR WIDENING STREET.—If Commissioners appointed to assess damages and estimate benefits to lot owners for widening a street apportion the amount of money to be raised into two or more parts, one part on the property holders of the street to be widened, and another part on the owners of property fronting on the cross streets determined to be benefited, and no complaint is made as to the correctness of this apportionment, the owners of lots on the street to be improved cannot complain of the manner in which the part apportioned to the cross streets is afterward apportioned among the property holders on those streets, and *vice versa.*

BENEFITS ACCRUE TO LAND.—The benefits resulting from the widening of a street accrue to the owner through his estate in the land, whether the estate be a fee or a leasehold, and not through the buildings thereon. The enhancement in value accrues to the land, not to the buildings.

ASSESSMENTS ON CROSS STREETS BENEFITED, CONSTITUTIONAL.—A statute authorizing the assessment of a portion of the expenses for widening a street in a city

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[1] Approved and followed, Appeal of Brooks and Josephs, post 560; Appeal of Reese, post 568. Appeal in special cases, instanced, Appeal of S. O. Houghton, 42 Cal. 68.

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upon lots benefited, situate on cross streets adjacent to the street to be widened is constitutional.

IDEM.—A statute authorizing the Board of Supervisors of the city and county of San Francisco to determine what part of the city will be benefited by the widening of a street, and to assess the expense of the improvement upon the specific portion of the city thus determined to be peculiarly benefited, is constitutional.

APPEAL from the County Court, city and county of San Francisco.

The Legislature passed an act (See Stat. 1864, p. 347) giving power to the Board of Supervisors of San Francisco to determine by order to lay out, open, extend, widen, or straighten any street in said city, and that it will be necessary to take private lands for that purpose. Acting under [531] the *provisions of said law, the Board on the 19th of September, 1864, by order, determined to widen Kearny street to the width of seventy-five feet, instead of its then width of forty-five feet five inches. Such proceedings were thereafter taken by said Board that the County Court acquired jurisdiction and appointed three freeholders Commissioners of appraisal and assessment. The Commissioners proceeded to view the premises, and examined witnesses, and made a report of their appraisal and assessment to the County Court. By this report several lots belonging to Piper, the appellant, were assessed for benefits received by widening the street. None of appellant's property was taken, as his lots were on the side of Kearny street not disturbed, or on cross streets. The County Court assigned the 12th day of June, 1866, for hearing objections to the confirmation of the report, and on said day said Piper filed his objections, which were as follows:

"William A. Piper, by his attorney, comes and objects to the confirmation of the report of the Commissioners appointed to assess the damages for the widening of Kearny street, and avers that he is the owner of the following lots, to wit:

"A lot on the southeast corner of Kearny and Merchant streets, fronting thirty-nine and one-half feet on Kearny street and sixty-eight and nine twelfths feet on Merchant street.

"A lot on the southeast corner of Third and Tehama streets, fronting thirty feet on Third street and eighty feet on Tehama street.

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"A lot on the northeast corner of Third and Clementina streets; and for grounds of objection to said report he alleges and sets forth the following, to wit:

"1. That the assessment of damages and benefits to result from said improvement, as made by said Commissioners, is unjust, unequal, and not in any degree uniform.

"2. That in assessing the benefits the said Commissioners have assessed some lots, and particularly those of this objector, far beyond the benefits which said lots will receive from said *improvements, and have assessed other lots much [532] below the proper sums.

"3. That in assessing the benefits, there is included in said assessments a large amount of property not situate upon, or contiguous to, Kearny street, and which will not be directly benefited by said improvement, nor otherwise benefited, than as the whole mass of property in the vicinity of Kearny street is benefited.

"4. That under the statute, in that behalf provided, no property can be lawfully assessed for benefits to be received from said improvement, except that fronting on Kearny street; whereas it appears from said report that a large amount of property situate on Third street, Bush, Sutter, and other cross streets, has been assessed."

Under these general objections, he then specified the particulars wherein he claimed the assessment was unequal, etc.

The attorney for the city and county filed a replication to the objections, and thereafter the County Court proceeded to hear the objections of the contestant, and testimony was introduced by both parties. The County Court overruled the objection of the contestant, and confirmed the report of the Commissioners.

The property taken was twenty-nine and seven twelfths feet on the west side of Kearny, from Broadway to Market, and a corner off Third and Market. The assessment was made on all property from Broadway to Market, and on the streets crossing Kearny to a depth of two hundred and seventy-five feet from the old lines of Kearny street, and on the lots fronting on Third street, and on those fronting on Market street, for two hundred and seventy-five feet on each side of Third.

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On the cross streets, the rate of assessment diminished foot by foot as the distance from Kearny increased. On some of the principal cross streets, this rate or scale commenced at eleven dollars per front foot; on others, when the grade was steep or the street narrow, and consequently the bene-
[533] fit less, *this scale of eleven dollars was diminished in proportion, in some cases one-third, in others one-half, etc.

The contestant appealed from the judgment of the County Court.

A more general statement of the facts connected with the widening of Kearny street will be found in the case of the Appeal of the N. B. & M. R. R. Co., ante 499.

The other facts are stated in the opinion of the Court.

J. B. Crockett and *Edward J. Pringle*, for Appellant.

The proof establishes beyond question that appellant's lot on Kearny street was assessed for benefits far beyond any which are likely to accrue. The whole basis of the assessment is erroneous, inasmuch as it assumes that all the lots on the street are to be benefited in an equal ratio. The report is erroneous in not having included the buildings in the assessment for benefits. The Board of Supervisors had no authority to include property on Third and Market streets, in the assessment for benefits, nor any property not fronting on Kearny street. It was beyond the constitutional power of the Legislature to confer such authority on the Board of Supervisors. The expense of widening the street should have been borne by the whole city.

A uniform percentage upon the market value of the lots could not possibly represent the respective benefits derived from the widening. Whatever other system should be adopted as the true one, this uniform percentage on the market values must be a false one. Because it is clear that elements of shape, exposure to light and air, and travel, must enter differently into the question of market value, and into the question of benefit by widening. All that can be said with any reason in favor of a uniform percentage, is that the benefit by the widening might be proportionate to the market value on lots

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of the same size and shape. Beyond that the proportion cannot go. A lot which presents a small frontage to the street, with a great depth, may have an equal market value with an *adjoining lot of great frontage and small [534] depth. But the lot of great frontage must be more benefited by the light and air and travel which result from the widening than the lot which presents its narrower front to the thoroughfare. And so, where at one point of the street one foot of frontage equals in value four feet situated at another point, the one foot must be, relatively to market value, less affected by these results of the widening than the four feet. The latter presents four times the surface to be affected by all the widening influences. Again: the population of the town being greater near one end of the town than the other, greatly in excess at the south end over that at the north, the benefit of the widening must be greater where the necessity is greater for room to accommodate the crowd. In general, the market value would represent this distribution of population.

The above are but illustrations of many points which will suggest themselves, in which the elements of market value differ from the elements of benefit by widening. If we can establish only one such point of difference, it is enough to convict this uniform percentage system of error. Its great vice is its uniformity. The lot holders were entitled to the judgment of the Commissioners upon each undivided lot. A tax per front foot, varying where the elements of benefit vary, would have been much more in accordance with the injunction of the statute which requires them to assess "as near as may be in proportion to the benefit which each shall be deemed to acquire," etc.

The Commissioners also erred in refusing to assess for benefits the owners of any of the houses within the territory deemed by the Board of Supervisors to be benefited by the widening. The statute is explicit, requiring the assessment to be made "upon all the owners and occupants of lands and houses within the territory," etc. In the exercise of a vague judgment the Commissioners have ignored this requirement in the case of the buildings. They have assumed to say that the buildings derive no benefit from the widening and should

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not be assessed. This is a fatal departure from the in-
[535] junction of *the statute. Where the statute has pre-
scribed, the Commissioners have no discretion. That, in the judgment of the Commissioners, there is no assessable benefit to houses, is no excuse to them. The Commissioners claim that the true ratio of assessment is obtained by taxing the lots irrespective of buildings, because each lot will bear its building sooner or later. But the time at which the assessment is made is the time when the values are to be ascertained. Whatever is then subject to be increased in value by the widening is the true mark for the assessment.

A. Campbell, for Respondent.

Should this Court examine into questions of fact, we urge, in all the cases, that the evidence is so conflicting that this Court will not disturb the assessment of the Commissioners, confirmed by the County Court, on full hearing of the whole testimony. The witnesses are speaking generally in these cases to matters of opinion. Taxation is not an exact science: if a reasonable approximation can be arrived at, it is all that can be required. (Doe *v.* Vallejo, 29 Cal. 386.) In ascertaining the market value of lots, the elements of shape, light, air, and travel must necessarily be considered; and in addition to and above all these, location, unless that is included in "travel." A lot with a very narrow front and great depth, on a good street, cannot be considered so valuable as one with a wide front, and less but sufficient depth for business purposes. A small lot on that portion of the street most valuable from general causes—such as the concentration of population and business around it—will be benefited by the widening, by having the travel in its front increased on the great thoroughfare. A large lot in a less valuable part will be in like manner benefited by having its travel increased; but the *relative* values of these two lots arising from their several locations and surroundings will not be changed. Each will retain the respective advantages it had before: each will par-
ticipate in the benefit from the increased travel pre-
[536] cisely in proportion *to the advantage derived from its location. In a populous and valuable neighborhood,

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the travel on the widened street will be greater than in a sparsely populated or non-business location. But the respective values of the several lots are determined by these same advantages of location, business, and population; and when the Commissioners value the lots for assessment at their respective market rates, and put the higher amount on the lots south, according to their location and the rise which has there taken place, and a lower amount on the lots north, because they have not partaken of the general rise, and assess a uniform percentage, it appears incontestable that the assessment is in exact proportion to the benefit. To the point, that appellant's lot will not be benefited at all, we contend that this question cannot be inquired into, either by the Commissioners, the Court below, or this Court: it belongs exclusively to the Legislature and their agents—in this behalf, the Board of Supervisors. Appellant has had his day in Court (in sec. 1 of the act of 1863–4, referred to): he had there an opportunity to contend that he was not benefited, and could have been heard. (Sedg. on Con. Law, 533; Emery *v.* S. F. Gas Co., 28 Cal. 345, and cases there cited; 4 N. Y. 419, overruling 6 Barb. 209.) Power to apportion has no limit. The remedy is with the Legislature. (8 Wend. 102; 14 Ohio, 173; Stat. 1863–4, p. 347, secs. 1–8.)

By the Court, SAWYER, J.:

Ths is an appeal from the order of the County Court of the city and county of San Francisco, confirming the report of the Commissioners appointed by said Court to appraise the damages sustained by the respective parties, portions of whose lots were taken for the purpose of widening Kearny street, and to assess the benefits and apportion the expenses of the work upon the property benefited. For the purpose of the several appeals, we shall, without deciding the point, consider the questions raised as properly arising on the record.

The *first two points presented are, that the appellant's [537] lot is shown by the proofs taken before the County Court to have been assessed for benefits far beyond what are likely to accrue; but if mistaken in this, that it is assessed too high, as compared with the assessments for benefit to

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other lots; and we are asked to set aside the report as being against the weight of evidence on these points. This Court exercises appellate jurisdiction only, and reviews the action of two other bodies, which have passed upon the same questions of fact.

When the verdict of a jury, or finding of the Court, is based upon evidence in which there is a substantial conflict, this Court will not set it aside on the ground that it is contrary to the evidence. (Lyle *v.* Rollins, 25 Cal. 440; Ellis *v.* Jeans, 26 Id. 273; Doe *v.* Vallejo, 29 Id. 390; Rice *v.* Cunningham, Id. 495.) The rule is not peculiar to this Court: it is an established principle in the practice of all appellate Courts. The reasons upon which this rule of appellate Courts is founded apply with even greater force to proceedings of the kind now in question, than to verdicts. The law, in the first place, requires three Commissioners to be appointed, to make the appraisement and assessment. They are not, like jurors, selected by lot out of all citizens possessing the statutory qualifications—good, bad, and indifferent, and of every grade of capacity and intelligence—but are selected, after the parties interested are heard upon the question, with special reference to their fitness to discharge the particular duties devolved upon them by law in the given case. After having been sworn to faithfully discharge their duties "without favor or partiality," they are required to "proceed to view the lands and tenements mentioned and described in the notice, ordinances, resolutions, and maps aforesaid [of the designated district], and may examine witnesses on oath," etc. In case of "doubt respecting any legal principle involved in these proceedings," they are authorized and required "to apply to the said County Court for instructions." It is their duty [538] to *investigate the subject thoroughly; examine witnesses if deemed important; obtain all the information within their power; reflect upon the subject, and finally embody the result of their investigation and reflection in their report. Their own observation, their own knowledge, their own reflections and judgment, as well as the testimony of witnesses, constitute important elements in the conclusions attained. The result of their investigations and deliberations

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having been embodied in a report and filed, a day is appointed by the Court to hear objections against its confirmation, and all parties interested are entitled to be heard, and to "take proof in relation thereto." Upon the facts reported, the report itself would make something more than a mere *prima facie* case, and it would devolve upon the attacking party to overthrow it by proofs, and the proofs should be clear beyond all reasonable doubt or controversy. The report is something more than the testimony of three intelligent and respectable witnesses. It is the judgment of three men selected under the law, in view of their peculiar fitness, after a thorough investigation of the matter committed to them, and embodies the result of their own experience, observation, and reflection, as well as the information received from others. But this question has been fully discussed by eminent jurists, and we shall adopt what they have so well said, rather than attempt to discuss the subject anew.

In the Matter of Pearl Street, 19 Wend. 652, Mr. Justice Cowen said: "I do not deny that cases may arise in which a reconsideration of the report should be awarded, upon the mere weight of evidence; but to induce to such a course, the facts should be of a very decisive character, and border strongly on the conclusive. I am not prepared to say that, in reviewing the decision of these Commissioners, even a *prima facie* case against their award, derived from proofs independent of their opinion, should be listened to as a valid objection. It must, in general, be enough to sustain their estimates and assessments, that no positive rule of law has been violated. If we do not find that the legal interest of the tenant, owner, *etc., has been misapprehended, their decision [539] then stands as a matter of opinion on the value of an article in the market. So many considerations of time, locality, and other circumstances enter into the estimate, that the only means of finally settling the question is an appraisal. That is committed by the statute to Commissioners appointed by this Court and carefully selected. (2 R. L. of 1813, p. 409, sec. 178.) They have power and it is made their duty to view the premises, if necessary, examine experts, to whom they may administer an oath, and explore all the best sources of inform-

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ation. (Id. 410; Stat. Sess. of 1818, p. 196, sec. 2.) With these means they generally combine a considerable degree of previous local knowledge. Great differences of opinion may and frequently do exist among witnesses. It is hardly ever safe to disturb the decision of such a question, or any other question of fact made by the tribunal to whom it is primarily committed. Whether it come from a jury, a master, referees, or Commissioners, we must be governed by the same principle. The very circumstance that it is open to a difference of opinion should lead us to conclude that the first decision can rarely be bettered by a reversal founded on the partial and refracted light of an appellate tribunal." Much more is very forcibly said upon the subject in the same case. After much doubt and great hesitation, on what appeared to be a perfectly clear case, Mr. Justice Cowen recommitted the matter to the same Commissioners, but he was afterwards, evidently, dissatisfied with this determination. (19 Wend. 671.)

Again: In the Matter of John and Cherry Streets, 19 Wend. 669, the same distinguished jurist says: "Admitting the Commissioners to have acted on correct principles, and that they proceeded regularly, (which is denied in respect to the receiving of an unsworn appraisal, made under their direction, a very material paper, which I shall hereafter notice more particularly,) I am not satisfied that I ought to remit this report for reconsideration upon any of the objections founded on value. All the proofs mentioned having been regularly before the Commissioners, I would presume that [540] *they received due consideration; and so far as they tended to increase the demands of the claimants beyond what was allowed, were not met with proper grounds of qualification. With the opportunity of viewing the premises, a local knowledge of the business and character of the street, of the market value of lots and buildings, and, indeed, all the elements which go to make up an opinion; or, at least, the most advantageous means of acquiring the requisite knowledge in all particulars from the best sources; and then the full means of applying their knowledge on consultation, the Commissioners have come to conclusions differing from those of the deponents whose affidavits were before them, and

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are now before me. The Commissioners, too, were sworn, and had power to examine experts on oath—merchants, surveyors, mechanics, etc., adepts in commerce, values, mensuration, removing, building, repairing, etc., and I must intend that, whenever such examination was necessary to solve doubts, it was had. *Men of ordinary capacity can hardly go through with such a laborious estimate and assessment and re-estimate and re-assessment as the one before me without becoming themselves expert in all the departments of knowledge necessary to the business they are about.* In regard to a few of the obligations, I admit that the affidavits go into particulars derived from skilful men and other satisfactory sources, which, under my limited means of judgment, lead me somewhat to doubt the accuracy of the Commissioners in the values which they arrived at, but I want more to enable me to disturb their report. I repeat, that the estimate and assessment of values belong peculiarly to them, and I cannot set aside their report on the ground of error in this respect, without a case is made against them, clear, strong, and indubitable. I admit that it is very difficult to make out such a case upon *ex parte* affidavits, which are the sort of proof usually before us in street causes, and I believe it has seldom been done. The proof is, in its own nature, open to much observation, and in common experience calls for great reduction, especially when it comes in the form of mere opinion as to price or benefit or damage in *respect to a projected improvement. The [541] most candid and skilful entertain opinions on these subjects widely different, and I cannot in this case place the results thus stated by witnesses, or such as I might myself draw from particulars thus stated, in successful opposition to what I must think the more enlightened views of the Commissioners. Mr. Justice Bronson remarked, In the Matter of Furman Street, 17 Wend. 663, 'that the reviews on appeal can, for the most part, extend to error in principle only. When a right rule for making the estimate has been settled, it must very often be impracticable for this Court to ascertain whether too much or too little has been awarded to any individual for damages. In the case under consideration, many of the witnesses differ one-half in relation to the true value of

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the land which has been taken for the street, and the Court has no adequate means of arriving at a true estimate. We can only interfere with the report where, upon the proof as it appears by the affidavits, there is a plain and decided preponderance of evidence against the judgment of the Commissioners.' What Judge, Commissioner, or juror ever sat, what lawyer ever practiced in a Court of original jurisdiction where these questions of damage and benefit are daily heard, without witnessing the same conflict and arriving at the same conclusion? The right rule is seldom mistaken. It is the present and future value in cash, of lands, rents, materials, and labor. But the premises from which that value is to be drawn are often so complicated, and above all, the views of witnesses so imperfect, their language so obscure, and the subject itself lying so much in the region of conjecture, that an oral examination and cross-examination and all other, the best means of judgment are necessary. (Vide Commonwealth *v.* The Justices, etc., of Norfolk, 5 Mass. 435, 437; Commonwealth *v.* The Justices, etc., of Middlesex, 9 Id. 388; Commonwealth *v.* Coombs, 2 Id. 489, 492; Callender *v.* Marsh, 1 Pick. 418, 432, 433.) * * * These reports of Commissioners, in respect to values, are in the nature of a verdict of a jury upon a question of fact, which is never set aside as against evidence [542] unless it appear affirmatively and *clearly to have been unwarranted by the proofs. There is more difficulty in showing this against the Commissioners' report, because from the nature of the proceeding they must make a more free use of their private knowledge than juries are warranted in doing. The latter are confined to action upon their general knowledge, and cannot go on their knowledge of particular facts without being sworn and communicating them as witnesses. (Rex *v.* Rosser, 7 Carr. & P. 648.) Admitting everything, therefore, to have been regular, I should hardly deem the report impeached upon its merits in any matter of valuation." (671.)

And In the Matter of William and Anthony Streets, 19 Wend. 694, Mr. Justice Bronson said: "Courts seldom set aside the verdict of a jury on the sole ground that they may think it against the weight of evidence. And yet there is

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much less difficulty in such a review than there is in the case under consideration. Jurors do not act upon particular facts within their own knowledge, but upon written documents and the testimony of witnesses submitted to their consideration. The evidence upon which they form conclusions may be put upon paper and submitted to the Court for consideration. But it is not so, or at most only to a very limited extent, in relation to the proceedings of these Commissioners. They are selected not only with reference to their integrity and general capacity for business, but on account of the knowledge which they are supposed to possess concerning the particular duty which they are appointed to discharge. Such information as they have in relation to the value of the property taken, and the probable effect of the improvement upon other property in the same neighborhood—in whatever way the information may have been obtained—they are at liberty to use. The very first thing which is required of them by law, after taking the oath of office, is to view the premises affected by the improvement. (Sec. 178.) They are thus to acquire information, and that, too, of the most important character, which there are no means of bringing before this Court. And beyond this, I entertain no doubt that the Commissioners may take the *opinion of others, in whose integrity [543] and judgment they have confidence, without swearing them as witnesses. They may converse with all classes of men concerning the business in hand, and collect information in all the ways which a prudent man usually takes to satisfy his own mind concerning matters of the like kind, where his own interests are involved in the inquiry. The Commissioners must exercise their own judgment at the last, but they may first seek light from other minds, the better to enable themselves to arrive at just conclusions. When the original jurisdiction is exercised in this manner, it is impossible that there should be anything like a regular judicial review.

"We cannot regard the Commissioners as witnesses merely, and then suffer their judgment to be balanced by the opinions expressed in three opposing affidavits, and to be outweighed when a fourth is added. For aught that we can know, the judgment expressed by the Commissioners upon questions of

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value, may combine the opinions of a hundred men who are in all respects as well qualified to form just conclusions as those who make opposing affidavits. In settling questions of value, the Commissioners do not sit as a Court and jury and decide upon the evidence of witnesses examined before them. Nothing of this kind was contemplated by the act of 1813, nor can it be justly inferred from the act of 1818, which authorized them to administer oaths. (Stat. of 1818, p. 196, sec. 2.) Estimates from mechanics and builders may become important in the discharge of the duties of the Commissioners, and in these and other cases they may require the sanction of an oath to the estimates which they receive. If, in any case, they make the opinions of others the basis of action without exercising their own judgment, those opinions should be given upon oath. But when they only seek information for the purpose of enlightening their own judgments, they may obtain it in any of the ways in which men usually acquire knowledge. They need not, and in point of practice they do not, sit as a Court. If in any case they take the testimony of witnesses in relation to value, it is but an item in the [544] account, which *may go to qualify, but cannot control their own opinions. How, then, is it possible that we can disturb the report, upon mere questions of value, on the single ground that five, ten, or even twenty respectable men have sworn to opinions at variance with the judgment of the Commissioners?

"A review was given to this Court for the purpose of seeing that the Commissioners exercise their authority in the forms prescribed by law, and for the correction of any error in the principle upon which they have proceeded in making their awards. After what has been done in other cases, I will not say that we cannot go beyond this and examine questions of value. But there must be something more than the opinions of witnesses against the judgment of the Commissioners. We must have facts. There must be something like demonstration that the Commissioners have fallen into error." And in Pryor's Appeal, 5 Abb. Pr. 275, Mr. Justice Mitchell expresses similar views.

We have to start with in this case the report of the three

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Commissioners selected with reference to their peculiar qualifications for the important and delicate duties intrusted to them, and there is no objection raised as to their fitness. They spent some seven months in their investigations and deliberations, and enough of their doings is shown by the record to make it apparent that they carefully considered the subject, compared one lot with another, and thoroughly studied the various influences which have combined during the last few years to affect the value of the property in the district to be charged with the expense of the work. Upon the filing of the report, several parties out of the large number affected filed objections, and, so far as the records now before us show, they all selected the same two or three lots as standards of comparison, and relied mainly on the fifty vara lot of Main & Winchester, corner of Post and Kearny streets. If there is any inequality in the assessment, it may fairly be presumed that it will be more apparent between that lot and those of the appellants than anywhere else. An investigation was had before the County Court upon these objections, and *the evidence was directed mainly to the [545] lots selected by appellants for the comparison. Evidence was introduced both against and in favor of the report, and the County Judge, after an elaborate review of the testimony, in an opinion evincing a critical and thorough consideration of the whole subject, sustained and confirmed the report of the Commissioners; and it is by no means clear to our minds that the reasoning of the County Judge, in his opinion in this case, is satisfactorily answered by the counsel of appellant. However this may be, as a matter of reasoning, there is a manifest and substantial conflict in the evidence introduced upon the two points now under discussion, viz.: as to whether the amount of the benefits assessed exceeds the benefits likely to accrue from the widening of the street; and as to whether the amount of benefits assessed is relatively too high. On both points there is a wide difference in the opinions of appellant's own witnesses, as there necessarily must be in such matters. Some of them evidently do not accurately distinguish between the enhanced value of the property on the south end of Kearny street, resulting from numer-

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ous other causes, and that which results alone from the widening of the street; while the latter, only, is to be regarded in assessing the amount of benefits. Some of the testimony is manifestly wild, but if we were to take the testimony of the appellant alone, and carefully scrutinize it, without reference to the report of the Commissioners, or the testimony on the part of the respondent, it would appear from it, upon the whole, that there is a large enhancement of value in consequence of the widening of the street—as much at least as the benefits assessed; while the testimony of the witnesses on the part of the city shows a still greater enhancement of value, and strongly supports the report of the Commissioners, both as to the amount of the enhancement, and the equality of the assessment; and some of it is based upon an actual sale of the property of the appellant claimed to have been assessed too high. It is plain, from all the testimony, that, at [546] the south end of Kearny street, within the *last few years, there has been a very large enhancement in the value of property from other causes having no reference to the widening of the street—much more so than at the north end; and if we carefully analyze the appellant's testimony, it will be found that the great discrepancy in the testimony lies almost purely in the domain of conjecture rather than in the domain of facts; that it relates to the cause of the enhancement of value, as whether due to the widening of the street, or other causes, rather than to the fact, or extent of the enhancement. Testimony as to value must necessarily consist very much of opinions and often be of a very unsatisfactory character, but this is true to a much greater extent with reference to the amount of the enhancement of values, which is due to each of several causes combining to produce a given result. Those witnesses of appellant who attempt to fix the value of the property at the date of their testifying do not vary so much; for some seven of them estimate the then value of Main & Winchester's lot, at from eight hundred dollars to one thousand one hundred dollars per front foot; or an average of about nine hundred eighty-five dollars; five of them putting it at one thousand dollars per foot, and six of them, the value of the appellant's lot, at from seven hundred

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to one thousand dollars per foot, or an average of nine hundred twenty-six dollars per foot. Tested by an actual sale at auction, the value of the latter seems to have been about nine hundred sixty dollars per foot. But when they come to estimate how much of this value is due to the contemplated widening of Kearny street, the testimony lies almost entirely in the field of conjecture; and as might be expected, there is a wide difference in the views of different parties. The Commissioners, in valuing the property for the purpose of obtaining a basis for estimating the benefits, fixed the then value of Main & Winchester's lot at about seven hundred seventy dollars, and appellant's lot at about seven hundred forty dollars per front foot—each being somewhat lower than appellant's witnesses placed the value at the time they testified, and relatively about the same. To this, as we understand it, the *benefits are added. Thus, it is seen, that the [547] great discrepancy in the testimony of the appellant's witnesses, and between them and the witnesses of respondent, and the report of the Commissioners, relates, not to the value of the lands, but to the proportion which should be credited to the widening of the street, and that which is due to other causes, and the real contest arises upon testimony necessarily conjectural.

From considerations before stated, the peculiar qualifications sought in the appointment of the Commissioners, their long personal investigation of the subject, etc., the Commissioners, it would seem, must, in the nature of things, be better qualified to estimate these benefits than witnesses called to the stand for the occasion from among men engaged in active business requiring all their attention, to give, upon the spur of the moment, and upon less comprehensive views of the subject, their ideas, even though such witnesses may be dealers in real estate, and generally well informed as to its value. A careful examination of the testimony in the record cannot fail to show that very much of that portion relating to the enhancement of value resulting from the widening of the street, as compared with that resulting from other causes, consists of crude and hastily formed opinions.

It is further insisted that the assessment on Kearny street

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is erroneous, for the reason that it is made upon the hypothesis that all the lots on Kearny street will be benefited by the improvement in the ratio of their values, whereas the proof shows the fact to be otherwise. This point is really necessarily involved in the second, but it is discussed in the briefs as a separate point, and requires more particular notice. We are not authorized, nor are we asked, to assume as a legal proposition that the benefits to the several lots fronting on the street will not be in the same ratio as that of their value. It is a question of fact, and must be determined as such on evidence. And so the appellant treats it. But it is also one of those facts which lie almost wholly in the field of conjecture. Neither the senses nor our intellectual faculties can fully appreciate it. It cannot be exactly seen, or [548] felt, or weighed; *nor can its dimensions or boundaries be accurately measured and defined. It is a fact which the Commissioners were called upon to determine; and after a survey of the entire field, and giving the question the best consideration they could, they did determine that the benefits resulting to the owners of the property from the improvement would be in this case in the same ratio as that of the value of the property. On the hearing of objections, before the County Court, this was one of the grounds, and the main ground, of objection to the report. Testimony was taken upon the precise point, and witnesses, so far as we can judge, equally reputable and equally competent, differed in their opinion upon the question. Two of the Commissioners, Webb and Torrey, testified that in their opinion the benefits resulting to property along the whole line of Kearny street would be in the ratio of its value, and the testimony of Sherman and Burr is to the same effect. If these opinions are correct, as to the equality of ratios between the enhancement of value by improvement and the value of the property before the widening of the street, the basis upon which the benefits are apportioned on that street is the proper one. It may be true that the repetition of their opinion by the Commissioners upon the stand as witnesses adds nothing to the force of the report. If this be conceded, it still detracts nothing from the weight of their opinions upon the point, whether regarded

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as their evidence or their finding upon the question based upon inspection and information obtained, as well as their own judgment. It shows, at least, that they still adhered to the opinion, after it had been controverted and counter testimony taken, and the matter had been reconsidered in the light of such objections and testimony. By way of argument, it is said that any one acquainted with the topography of the city must see at a glance that the south end of the street must be benefited far more, in proportion to its value, than the north end, and such was our first impression; but the more we reflect upon the matter, the more difficult we find it to establish the conclusion by any satisfactory course of reasoning.

*The street is simply widened. Every foot of ground [549] upon the entire street to be widened has already been occupied for years. It will open into the same street, after it is widened, that it did before. The same streets cross it—no more and no less—and at the same points as before. The hills at the north and west were there before. The improved portion of the street will occupy the same relative position to the rest of the city, and to the localities toward which the business and population are tending, that it did before. The testimony does not show that the tendency of the population and business spoken of toward the south, has heretofore been owing to the widening of this street. It has manifestly, to a great extent, at least, been owing to other causes. A better class of business, requiring better and finer buildings, and inducing greater travel, will undoubtedly seek the street when widened, and it is not easy to see why the better class of business should not seek the entire street. It is said that toward the northern end the main travel comes down Washington and Clay streets, crossing Kearny into Montgomery. This is at present, doubtless, equally true of the streets crossing south of Clay. But if the anticipations of the projectors of the widening of Kearny street are realized, Kearny street, opening into Third, will become the great thoroughfare through the very heart of the city, from north to south, on the line of greatest travel, and the business of the fashionable world, to a great extent, transferred, or extended from Montgomery to Kearny street, and the travel which now comes to

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Montgomery instead of crossing will pass into Kearny. This is the result, to some extent, anticipated by the Commissioners, as appears in the testimony of one of them. There is, it is true, as stated in the argument, a rise of ground from Pacific to Broadway, but it is not so great but that a street railroad passes over it, and when Broadway is reached Kearny street opens into the most spacious avenue in the northern part of the city, extending westward with a grade easier than any other, and far lighter than on Washington. Can it be for a moment doubted that when Kearny street is widened, [550] broad sidewalks *constructed, and first-class buildings erected, the favorite line of travel from the north and northwest part of the city will be down Broadway into and through Kearny street, or that the anticipation of the Commissioners as to this street becoming the leading thoroughfare of the city from north to south are within the bounds of reasonable probabilities? When Kearny street is widened into the most spacious street in the heart of the city running in that direction, and the present structures on it are replaced by first-class commercial buildings from Market to Broadway, can it be doubted that much of the travel now coming down Geary, Post, Sutter, Bush, and Pine streets, crossing into Montgomery, will pass into Kearny, and northward on that street toward, and eventually, to a considerable extent, to Broadway? Or that the building up and occupation for fashionable shops of the southern half of Kearny street thus widened will of itself create a demand for similar structures toward the north, and gradually, at least, force such improvements forward until they reach Broadway? One of the Commissioners testifies that, after obtaining all the information they could in respect to travel, "they found the amount of travel about equal at all the crossings from Market to Washington; that the conclusion was, that property opposite the Plaza would be as much benefited as any south of it." The property of the appellant is opposite the Plaza, within the district between Washington and Market, and somewhere in the neighborhood of midway between the two termini of the portion of Kearny street to be widened. Should the widening of Kearny street result as anticipated, in making it the leading thoroughfare of

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the city from north to south, taking much of the travel that now crosses to Montgomery, the appellant's lot must be greatly benefited, and it is not easy to satisfactorily show why it should not be relatively as much benefited by the improvement as any other. Much may be said on both sides of the question, but we do not propose to discuss it at greater length. While we are not entirely satisfied that the rule adopted works with perfect equality, it is not entirely clear from the testimony or argument that it does *not; and the ques- [551] tion was one peculiarly in the province of the Commissioners to determine. It must, also, be admitted, we think, that they both had better opportunities of arriving at a correct conclusion, and that they were personally better qualified to determine the question than we. The matter was re-examined by the County Judge, and further testimony taken—the witnesses appearing in person before him—and, after a laborious consideration of the case, the report of the Commissioners was confirmed. The testimony is so much in conflict, and consists so entirely of matter of opinion, that we should not be justified in holding that the Commissioners and County Court erred.

It is argued that if the apportionment on Kearny street is made upon a correct principle, then the apportionment on Third street, and the cross streets within the district determined to be benefited, which was made upon a different hypothesis, must necessarily be erroneous. But this conclusion does not necessarily follow. These streets occupy an entirely different relation to the improvement made. It is supposed that the widening of Kearny street will make it the great thoroughfare north and south through the heart of the city, as Montgomery street now is, and the benefit to the cross streets will result solely from the fact of their close proximity to this great thoroughfare. As the benefit to property on those streets results from its proximity to, and not from the fact of its bordering on, the improvement, the nearer a lot on the cross streets approximates this thoroughfare, the greater will necessarily be the benefit derived. It is upon that very theory that the Board of Supervisors fixed upon the limits of the district determined to be benefited by the improvement

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for the purpose of assessing the expenses to be incurred in making it. As the locality recedes from the great artery of travel and business on the cross and secondary streets, the population tributary to it, and the travel upon it, gradually diminish till it becomes very small, and the value of the property diminishes in about the same ratio till it becomes valuable only for the purposes of husbandry. On the cross [552] streets this *gradual receding from the proximity of the improvement takes place; but it is not so on that portion of Kearny street widened. The diminishing scale of benefits as the property recedes from Market street along Kearny would not furnish the proper rule, for the very obvious reason that the improvement which it is supposed will work the great revolution in the line of travel and business is not at Market street, and there is no receding from it, as the advancement is made northward along Kearny street; but, on the contrary, the advancement is on the very line of the improvement, and the line of the increased travel and business, throughout the entire distance to Broadway. There is nothing in the testimony tending very strongly to show that the mode of apportionment adopted by the Commissioners for the cross streets and Third street does not operate equally. The Commissioners found upon examination four different classes of lots and property within the district, differently situated with reference to the contemplated improvement: Firstly—Kearny street, the street to be widened. Secondly—Third street, on the south side of Market, and virtually an extension of Kearny street southward from the point where the widened street terminates. Thirdly—The North Beach and Mission Railroad; and Fourthly—Streets crossing Kearny. The whole amount to be raised was first apportioned among these four classes—a certain amount to Kearny street, and a certain amount to each of the other classes. No complaint is made that the proper portions have not been assigned to each of these divisions or classes, if the property on Third and the cross streets is liable to be assessed at all. It being assumed that the proper amount has been assigned to Kearny street, the owner of property on Kearny street is thenceforth interested no further than to have the part assigned to Kearny

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street equally apportioned among the property holders on that street according to the benefits. He cannot claim that an error has been made in apportioning the amount assigned to cross streets among the property holders on those streets; or that the Commissioners adopted a different mode of arriving at the apportionment on those streets.

*The statute prescribes only one rule of apportion- [553] ment, and that is according to benefits. But, to ascertain the benefits, it may be necessary to apply different principles to property having a different relative situation to the improvement, and presenting different elements affecting the questions of value and benefits. The Commissioners, in this instance, found it necessary to consider different elements in making the apportionments according to the benefits, and it rests with the objectors to show conclusively that they erred in their estimate of the effect of these various elements.

It is next claimed that the Commissioners erred in not assessing the buildings on the lots as well as the lots, and that the buildings were not considered in the assessment. The law does not say that the buildings, as such, shall be assessed separately from the lots. The assessment is to be in proportion to the benefit which the owners and occupants of lands and houses shall acquire, and is made a lien upon, and collected out of, the lands through which the benefit is derived. The property enhanced in value, and through which the benefit accrues, is the thing in respect to which the assessment is made, and the basis on which it rests. Section seven says that the Commissioners "shall apportion and assess the whole amount * * * upon all the owners and occupants of lands and houses within the territory deemed * * * benefited by such improvement, as near as may be in proportion to the benefits which each shall be deemed to acquire by the making thereof." And section sixteen provides: "The expense of any public improvement herein authorized shall be defrayed by assessment on the owners and occupants of houses and lands, corporations and companies, that may be benefited thereby." And by section eight, the report must specify "the sums of money which each and every owner or occupant of houses and lands, corporation or company, deemed

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to be benefited by such improvement * * * should pay toward the expense of making the same, and the lands [not lands and houses] in respect to which he shall be [554] deemed by *them to be benefited." Section fifteen requires the assessment roll to contain, in proper columns, "the names of all persons * * * assessed when known;" "the description of the land [not lands and houses] in respect to which they are assessed;" "the amount to which such person shall respectively be assessed," and the amounts are to be collected in the same manner as taxes are collected in said city and county, "and shall in like manner be a lien upon the respective tracts or parcels of land," etc. [not lands and houses.] Thus it appears that when reference is made to the property "in respect to which he shall be deemed by them benefited" as in the eighth section, or "in respect to which they are assessed," or upon which the amount assessed "shall in like manner be a lien" as in section fifteen, land only is mentioned. Nothing is said about houses. And houses are only mentioned in those sections by way of *descriptio personæ* in connection with lands to indicate the person who is to pay the assessment upon the lands through which the benefit is acquired. Lands include the houses erected on them. The owner and occupant is to pay an assessment in proportion to the benefits received—not upon the valuation of the entire property, including buildings. If he is assessed in proportion to the entire benefit received, it can make no possible difference whether a part of the benefit is credited to the land and a part to the house erected on it, or all credited to the land. It is all taken into consideration somewhere. Nor do the injunctions of the statute require in terms, or by necessary implication, that it should be so dtstributed.

The land, in the strictest sense of the term, is the only thing of a permanent character. It cannot be removed, enlarged, diminished, or destroyed, and we do not see why the benefit should not all be regarded as accruing to the land alone. It is so regarded in theory by writers upon political economy. Adam Smith, in his great work on the Wealth of Nations, says: "The building rent is the interest or profit of the capital expended in building the house. In order to put

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the trade of a builder upon a level with other trades, it is *necessary that this rent should be sufficient first, to [555] pay him the same interest which he would have got for his capital if he had lent it upon good security; and, secondly, to keep the house in constant repair, or, what comes to the same thing, to replace, within a certain number of years, the capital which had been employed in building it. The building rent, or the ordinary profit of building, is, therefore, everywhere regulated by the ordinary interest of money. * * * Whatever part of the whole rent of a house is over and above what is sufficient for affording this reasonable profit naturally goes to the ground rent; and when the owner of the ground and the owner of the building are two different persons, is, in most cases, completely paid to the former. The surplus rent is the price which the inhabitant of the house pays for some real or supposed advantage of the situation. In country houses, at a distance from any great town, where there is plenty of ground to choose upon, the ground rent is scarce anything, or no more than what the ground which the house stands upon would pay if employed in agriculture. In country villas in the neighborhood of some great town it is sometimes a good deal higher; and the peculiar conveniency or beauty of situation is frequently very well paid for. Ground rents are generally highest in the Capital, and in those particular parts of it where there happens to be the greatest demand for houses, whatever be the reason of that demand, whether for trade and business, for pleasure and society, or for mere vanity and fashion." (Vol. III., Lon. ed., 1805, pp. 294–5.)

Thus, that profound thinker arrives at the same conclusion upon this subject that the Commissioners in this case—three practical business men—attained, after investigating the subject in a practical way, and which, it seems to us, must be attained by every reflecting mind. It would seem that it must be so from the nature of things. How could it be possible that a building, wherever situate, should be worth any more than it would cost to put another there like it, and, say, the rent, or that portion of the net rent over wear and tear, during the period of time required to erect it and put it in a *condition for occupancy? If it were destroyed [556]

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to-day, another could be erected at actual cost to-morrow, and the destruction and restoration might be repeated *ad infinitum*. If any value accrues in consequence of changes in the surrounding circumstances, it necessarily attaches to the land—to the location. Should the building be destroyed by fire, the land would sell for as much without as with it, less the cost of erecting another like it and the net rents during the period required to put it in a condition to occupy: in practice, probably for more. It would make no difference whether the land was in the hands of the owner in fee, or under lease; for in the latter case, the enhanced value would, during the term, go to the leasehold estate in the land. The building would actually be worth no more annexed to a leasehold estate than to the fee. It could be replaced for the same money in one case as in the other. In this case, the Commissioners did take into consideration the entire benefits to buildings as well as lands. This presumption would arise on the report itself. But one of the Commissioners, Torrey, was called to testify upon the point, and said: "We took into consideration the benefits to buildings and lands. The usual way of assessing is on lands and improvements [probably referring to valuation for purposes of ordinary taxation.] This differs—it was the benefit to the property we were looking for." And that is precisely what the statute required them to look for. Upon the views before presented, the only enhancement of value to buildings in consequence of the improvement that could in any event take place would be the increased rents during the time it would take to erect such a building, or put a building already there in a suitable condition. A party having a suitable building on his land would hold this advantage—no more. The Commissioners found that on one side of the street throughout its entire length, it was necessary to cut away the buildings for a distance of over twenty-nine feet—the width added to the street—and that, as a matter of absolute necessity, all the buildings on that side would have to be rebuilt, or greatly remodeled. On the
[557] other side, they found a class of third and *fourth rate buildings, some of brick and some of wood, none of which, it is conceded on all hands, are suitable to the condi-

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tion or contemplated business of the widened street. All, therefore, would either have to be entirely remodeled or torn down and new ones erected in their place, or else the owners could not reap the full benefits which would otherwise accrue to their lands. Either the change must be made sooner or later, or the benefits resulting from the widening would not practically accrue. The Commissioners found that it would take about the same time to remodel, so as to adapt these buildings to the new condition of things, as to construct new buildings; and that the owners would therefore, sooner or later, all alike lose about the same amount of time in the interruption of the use of the buildings, and that the only element which could possibly give additional value to the building, as such, was therefore wanting. They determined that, under the circumstances of the case, the only benefit accruing to the owners and occupants of the houses and lands accrued in respect to the lands; and we see nothing in the testimony or arguments that would justify us in setting aside the report of the Commissioners, and the order of the County Court confirming it, on that point. There is much less plausibility in this objection than in the second and third.

The fifth point is, that the Board of Supervisors had no constitutional authority to include Third and Market streets, and portions of the several cross streets in the district supposed to be benefited, and, therefore, to be assessed for the payment of the expenses of the improvement. And the sixth point is, that the expense should have been borne by the whole city; and the Board of Supervisors had no constitutional power to impose the burden upon a specific portion of the city supposed to be peculiarly benefited. These points seem to be necessarily inconsistent with each other. But the question has been settled against the appellant in this State, and by what may be regarded as a uniform line of decisions in the other States. (Emery *v.* S. F. Gas Co., 28 Cal. *372; People *v.* Mayor of Brooklyn, 4 N. Y. [558] 430, and cases cited.)

If the facts are correctly ascertained by the Commissioners, no positive rule of law appears to have been violated; and upon the facts, there is a manifest and substantial conflict in

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the evidence on the points in contest. We are of opinion that the order confirming the report of the Commissioners must be affirmed, and it is so ordered.

Neither Mr. Justice RHODES nor Mr. Justice SANDERSON expressed any opinion.

BROOKS' AND JOSEPH'S APPEAL IN THE MATTER OF WIDENING KEARNY STREET.[1]

NEW TRIAL.—The rule laid down in Piper's Appeal, ante 530, as to granting a new trial on the ground that the judgment is not warranted by the evidence, affirmed.

SPECIFICATION OF OBJECTIONS TO CONFIRMING A REPORT.—A specification in an objection to the confirmation of the report of the Commissioners appointed to estimate benefits and assess damages to lot owners for widening Kearny street, in San Francisco, that "the Commissioners have assessed some lots far beyond, and others much below the proper sum," is too general to admit proof that a lot in which the objector had no interest was assessed relatively too low in comparison with another lot in which the objector has no interest.

COMPETENCY OF WITNESS ON TRIAL ABOUT CONFIRMING REPORT.—A Commissioner appointed to estimate benefits and assess damages to lot owners in the matter of widening a street in a city, is a competent witness on a trial in the County Court upon the question of confirming the report of the Commissioners when objections are made to it.

APPEAL from the County Court, city and county of San Francisco.

The main facts in this case are the same as in Piper's Appeal, ante 530.

Brooks and Joseph were the owners as tenants in common of a lot on the northwest corner of Kearny and Pacific streets, and Joseph was the owner of two lots, one on the westerly line of Kearny street, forty-eight feet six inches southerly [559] *from the southwest corner of Kearny and Broadway streets, the other on the easterly line of Kearny street, eighty feet northerly from the northeasterly corner of Kearny and Pacific streets. The Commissioners estimated

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[1] Appeal in special cases instanced, Appeal of S. O. Houghton, 42 Cal. 68.

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the benefits that would accrue and the damages that would be sustained by each lot and the buildings thereon. The appellants filed objections to the report, and it was stipulated that the objections of Brooks and Joseph, and of Joseph individually, should be heard and tried together. The County Court confirmed the report. The objectors appealed.

The other facts are stated in the opinion of the Court.

William Hayes, for Appellants.

On the question of damages the evidence was overwhelming against the amount allowed by the Commissioners, and there is no such conflict as to bring it within the rule heretofore adopted by this Court. (Carpentier *v.* Gardiner, 29 Cal. 164; Plate *v.* Vega, 31 Cal. 383.) A decision in disregard of the proof will be treated as founded in some erroneous view of the law applicable to the case. (3 E. D. Smith, 121.) The County Court erred in refusing to allow the objectors to prove that the lot on the corner of Sacramento and Kearny streets had been assessed for almost as much as the lot on the northwest corner of Kearny and Post streets, and that if the lot on the corner of Sacramento and Kearny streets should have been assessed, as in fact it was, at twenty thousand three hundred and thirty-five dollars, the lot on the corner of Post and Kearny streets should have been assessed at seventy-five thousand dollars, and that the actual assessment of twenty-one thousand four hundred and thirty-seven dollars and fifty cents on the lot on the corner of Post and Kearny streets was too low. The Commissioners exercised judicial powers. They ought not to have been permitted to prove the performance of any act by parol. The only proper evidence was the record of their minutes and proceedings. The County Court therefore erred in admitting the testimony of E. N. Torrey one of the Commissioners, and overruling the objections thereto. *(Stat. 1863–4, p. 350, sec. 7; Jackson *v.* [560] Daly, 5 Wend. 526; Meeker *v.* Van Rensselaer, 15 Id. 397; Hallock *v.* Woolsey, 23 Id. 328; see also Wood *v.* Byington, 2 Barb. Ch. 394; Lawrence *v.* Houghton, 5 John. 129; Posson *v.* Brown, 11 Id. 160; Brown *v.* Laine, 10 Wend. 525.)

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A. Campbell, for Respondent.

Appellants have nothing to do with the lots on corner of Post and Kearny, or Sacramento and Kearny streets. If appellant had intended to complain that any were assessed too low, he should have stated them in his complaint, so that respondent could have had notice, and could have been prepared to meet the case. There are no allegations in the complaint sufficient to admit the testimony. Out of the several hundred assessments, respondent would be wholly in the dark as to which were assessed too low. Appellant cannot complain that others are assessed too high—it is for his benefit. The Commissioners were not called to give judicial opinions, but to state facts; what they did, and how they did it. They do not give in evidence the testimony produced before them; they state the amount of damages and benefits, and how they arrived at them. The general policy is now to admit all, even parties interested, to testify—Brooks and Joseph both testified—either a Judge or a jury can be called, (1 Phil. on Ev. 7,) and this while the old strict rules were in force. The Commissioners are appointed to no judicial office and exercise no judicial functions.

By the Court, SAWYER, J.:

In this case, the record presents the same questions which were determined in Piper's Appeal, ante 530, and the principles stated in the opinion in that case, so far as they are applicable, must control this. In this case, the principal ground of complaint is, that the amount allowed for damages for the twenty-nine feet some inches taken from appellants' lots to be added to the width of the street is too small, [561] and *the strain of the testimony and argument bears most strongly upon this question. The principles stated in Piper's Appeal apply as well to this precise question as to the amount of benefits, absolute and relative, and need not be repeated. Aside from the report of the Commissioners, there is a wide difference in the opinions of the witnesses as to the value of the property and the amount of damages sustained. Among witnesses who have long been in business

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connected with the sale and renting of real estate in San Francisco, and who profess to be acquainted with the value of such property, the estimates of the value of the strip taken from the lot on the corner of Pacific and Kearny streets varies from six thousand five hundred dollars to thirty-three thousand dollars. But one of the numerous witnesses, however, besides the appellants themselves, place it so high as eighteen thousand dollars, and the range of the evidence of appellants' witnesses is considerably below that sum. There is a wide discrepancy in the testimony of the same witnesses of appellants as to the relative value of the strip taken from two adjacent lots. As, for instance, Carter, who puts the value of the strip taken from the corner lot at the highest figure of any witness not a party to the appeal, except one, estimates it at eighteen thousand seven hundred fifty-five dollars, and the value of the strip taken from the next lot on the north at two thousand one hundred seventy-five dollars; while Blood, a witness of appellants, estimates the same damages at thirteen thousand seven hundred fifty dollars for the first named lot, and five thousand dollars for the second; and Middleton, another of appellants' witnesses, estimates the damages to the first lot at twelve thousand dollars, and to the second, at two thousand seven hundred dollars. Thus, with respect to the two strips of land fronting on Kearny street taken from adjacent lots, Carter makes the second about one-ninth the value of the other; Middleton not quite one-fourth; and Blood between one-third and one-half. But we do not propose to analyze or discuss the testimony at length. These circumstances are only alluded *to as further illustrations [562] of the very uncertain and unsatisfactory character of mere crude and hastily formed opinions as testimony. Several of the appellants' witnesses had been consulted and their views considered by the Commissioners before making their report. It is quite apparent also that the witnesses generally examined on both sides had devoted very little time to a consideration of this particular matter, and several of them intimate as much. If we average the testimony, it will be found, it is true, that the average result attained by the entire number of witnesses will be considerably above the

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amount allowed by the Commissioners; but the Commissioners bestowed much more time and study on the question, as well as availed themselves of the opinions and experience of others; and when we consider the testimony of the witnesses, there was a real, substantial, and not a mere apparent conflict in the evidence, which brings the case clearly within the rule established in the practice of appellate courts stated in Piper's Appeal.

Several witnesses, besides those who testified to the same effect in Piper's Case, also testified that the ratio of benefits would be the same as the ratio of the value of the lots throughout the whole portion of the street widened. Indeed, on this issue the testimony seems, in this case, to be so nearly in consonance with the views of the Commissioners that the point is not very much pressed.

The appellants offered to prove that the lot on the corner of Post and Kearny streets was assessed for benefits too low, as compared with the assessment upon the lot at the corner of Sacramento and Kearny streets, and the testimony was excluded on the objection of respondent. The appellants do not appear to be interested in either of these lots. The specification in the objection to the report under which this testimony is claimed to be admissible is in the very general terms, "That in assessing the benefits, as aforesaid, the Commissioners have assessed some lots far beyond, and others much below, the proper sum." We think this too general. If the objectors claimed that some lots were assessed too low in com-
[563] parison with *others, they should have specified the lots in respect to which they supposed themselves aggrieved, so that the city could come prepared to meet the objection. It was their business to point out the real grounds of their complaint. The city should not be compelled to come to the trial before the County Court, prepared to defend the assessment on each and every one of several hundred lots without knowing upon which point the attack would be made. Such a requirement would be an intolerable burden. We think the Court properly excluded the testimony on that ground. Besides, the appellants had no concern with the relative assessment between those two lots. If neither of them

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was assessed too low relatively to the assessment upon their own lots, they were not injured. They did not propose by this testimony to show that either was assessed relatively too low with respect to their own, or even that their own was assessed relatively too high with respect to any other. Nor does the fourth specification in their objection before cited, under which this testimony is claimed to be admissible, state that their own lots were in any respect assessed for benefits relatively too high. The specification is that "the Commissioners have assessed some lots far beyond, and others much below, the proper sum"—not that theirs is assessed too high. Unless their assessment is too high, they cannot be injured in this respect. For this reason, also, the testimony was inadmissible.

The last point made is, that the Court erred in permitting Torrey, one of the Commissioners, to testify. We know of no legal principle which rendered Torrey incompetent to testify upon the matter in issue before the County Court. He was not called for the purpose of proving by secondary evidence the contents of the Commissioners' report, and the authorities cited to the point by appellants are wholly inapplicable. There was no occasion to prove the contents of the report. It was before the Court already, and showed upon its face the results attained, and the very objections under consideration were based upon it. The witnesses of appellants not only *testified to the value of the land [564] taken, and the damages sustained, but they explained how they made their estimates, and the process by which they arrived at their results. Mr. Torrey's testimony in this case was mainly directed to a similar statement of the process by which he would make, and did make, his estimates, and arrived at his results. This was matter not required to be shown by the report. The appellants could in no way be injured by it. On the contrary, it afforded them an opportunity, which they did not before have, to cross-examine the witness, examine the *modus operandi*, and expose the fallacy of the process, if any there was. It was advantageous, rather than injurious, if there was any error in the process. If there was no error in it, of course no injury could result. It is a

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mistake to regard these gentlemen in the character of partisans, and, therefore, as disqualified, even if partisanship were a disqualification. They were originally chosen, in part, at least, because they were supposed to be wholly disinterested and impartial, and we think it highly proper that they should go upon the stand as witnesses, and shed such additional light upon the subject as their knowledge of the facts might enable them to afford. The appellants themselves testified, and several of the witnesses called by them were personally interested in having the report set aside, and were opposing the confirmation in other proceedings upon objections of their own, and the others called by them were, doubtless, such as were found upon inquiry to entertain opinions most favorable to their side of the question. Such would naturally be the case. We think there was no error in admitting the testimony of Mr. Torrey.

We think the order of the County Court confirming the Commissioners' report must be affirmed, and it is so ordered.

Neither Mr. Justice RHODES nor Mr. Justice SANDERSON expressed any opinion.

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[565] *LEFEVRE'S APPEAL IN THE MATTER OF THE WIDENING OF KEARNY STREET.[1]

CONTESTED TITLE TO LOT IN WIDENING KEARNY STREET.—The determination of the Commissioners, in the matter of widening Kearny street in San Francisco, as to who is the owner of a lot, or a building thereon, and entitled to the money to be paid for damages estimated, is not conclusive; but where the right to the money is contested, the Board of Supervisors should pay the amount into the office of the County Clerk, and leave the contest between the claimants to be settled by the Courts in pursuance of the provisions of the statute.

APPEAL from the County Court, city and county of San Francisco.

The principal facts out of which this contest arose are stated in Piper's Appeal, ante 530.

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[1] Appeal in special cases instanced, Appeal of S. O. Houghton, 42 Cal. 68.

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One John J. Vioget was the owner of a lot on Kearny street, distant twenty-five feet and ten inches southerly from the southwest corner of Kearny and Commercial streets, and during his lifetime created an estate in said lot by lease to Adolphe Silvy and Francois Amoretti, to expire on the 10th day of June, 1870. Mrs. Lefevre claimed to be the assignee of the lease. The respondent claimed that she was only assignee of Silvy's interest in the lease, but that Amoretti had died without making any assignment of his interest, and that the same vested in his heirs. The Commissioners in their report awarded the sum of four thousand one hundred and thirty-three dollars and thirty-three cents to be paid to contestant and the heirs of Amoretti for damages to be sustained to a brick building on the lot, and the sum of fourteen thousand four hundred and sixty-six dollars and sixty-seven cents to the owner of the fee. Mrs. Lefevre claimed that the said sum of four thousand one hundred and thirty-three dollars and thirty-three cents should have been awarded to her alone, and on that ground objected to the confirmation of the report. The County Court confirmed the report, and she appealed.

J. B. Crockett and *Edward J. Pringle*, for Appellant.

A. Campbell, for Respondent.

*By the Court, SAWYER, J.: [566]

The only object of this appeal is, to avoid being concluded by the report of the Commissioners upon the question, as to whether the appellant is entitled to the half of the money awarded to the heirs of Amoretti for damages to the leasehold estate. We think it was not contemplated in the statute that the determination of the Commissioners on this point should be conclusive. They are not in a position to finally determine disputed titles to lands, and it was not intended that they should do so. The Commissioners report the true owners, so far as they are able to ascertain them. But the Board of Supervisors are intrusted with the payment of the moneys, and section seventeen provides, that when "the rights and interests of persons claiming the same [the money] shall in the

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opinion of the Board of Supervisors be doubtful, it shall be lawful for the said Board of Supervisors in any such case to pay the amount of such damages into the office of the Clerk of the said County Court, accompanied by a statement of the facts and circumstances under which said payment is made, and describing the lands and tenements taken by the said city and county of San Francisco for which such damages have been awarded;" and when so paid over, section nineteen points out the mode of determining the rights of the claimant and parties interested. Neither the Commissioners, nor the Board of Supervisors, are adapted to the litigation of conflicting claims to the amount awarded as damages, and, when any such conflicting claims to moneys awarded are presented to the Board of Supervisors, the only safe, or proper course for that body to pursue, is, to pay the amount into the office of the Clerk of the County Court, in the manner prescribed in section seventeen, and leave the contest to be determined by the judicial tribunals designated for that purpose by the act. The Commissioners supposed they had ascertained the proper parties interested, and accordingly indicated them in their report. This was their duty under the law, and we do not perceive that they could have done otherwise, unless they had
[567] reported *the parties as unknown, and this they could hardly have done under the evidence before them. But however this may be, their report will not prevent the appellant from urging her claim for the money before the Board of Supervisors, and establishing her rights before the tribunal designated for that purpose.

Order of confirmation affirmed.

Neither Mr. Justice RHODES nor Mr. Justice SANDERSON expressed any opinion.

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REESE'S APPEAL IN THE MATTER OF WIDENING KEARNY STREET.[1]

OWNER OF FEE OF LOT TO PAY TAX FOR WIDENING STREET.—The Commissioners appointed to estimate benefits and assess damages for widening a street in San Francisco under the act of April 4th, 1864, may properly assess the expenses to be borne by a lot which is under lease, to the owner of the fee, where the benefits all accrue to such owner, without apportioning any part of the same to the lessee.

APPEAL from the County Court, city and county of San Francisco.

The general facts connected with this case will be found stated in Piper's Appeal, ante 530.

Reese was the owner of a lot on Washington street, lying fifty-eight and one-half feet westerly of Kearny street. He had leased a part of the lot to three several tenants. The leases were dated March 1st, 1864, August 1st, 1864, and April 15th, 1865, and were each for a term of five years. He objected to the confirmation of the report of the Commissioners. The County Court overruled his objections, and confirmed the report, and he appealed.

The other facts are stated in the opinion of the Court.

J. B. Crockett and *Edward J. Pringle*, for Appellant.

A. Campbell, for Respondent.

*By the Court, SAWYER, J.: [568]

This case involves the same questions determined in Piper's Appeal, ante 530, and it is unnecessary to discuss them here. But one additional point appears to be relied on, and the principles by which it must be governed were also determined in that case. In this case, the land is under a lease. It is situate on a cross street, but within a few feet of the new line of Kearny street when widened, and on the side upon which the addition is to be made. The portion of the expenses assessed against the land is all assessed to the owner of the fee.

[1] Appeal in special cases instanced, Appeal of S. O. Houghton, 42 Cal. 68.

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The appellant claims that a part of it should have been assessed against the lessees. The Commissioners took the lease into consideration, and after a careful investigation, concluded that none of the benefits would accrue to the lessees, but all would accrue to the owner of the fee. They thought that the benefits to accrue from the widening of Kearny street would not be felt on the cross street till the widening should be completed, the new buildings erected, the new sidewalks constructed, and the street in its improved condition open to travel; that the time which would be required to complete the improvement, especially when the magnitude of the work and the probability of obstruction and delay likely to arise from litigation in regard to it is considered, was uncertain; that while the improvements were going on, the destruction of the buildings, the obstruction of the street, and the general disturbance consequent upon the work would interfere with the travel and business of the neighborhood for the time, and be a damage to the lessees rather than a benefit; that the full amount of rents would still be received during the time by the landlord; that the benefits would be for all time, and would accrue to him; and that no benefits over the damages resulting from the disturbance and interference with business would accrue to the lessees. The testimony is certainly insufficient to overthrow this view. We see nothing further of sufficient plausibility to require notice. The order confirming the Commissioners' report is affirmed.

[569] *Neither Mr. Justice RHODES nor Mr. Justice SANDERSON expressed any opinion.

JOHN WEDDERSPOON v. J. P. ROGERS.

[1] PLEADINGS ON NOTE.—If the complaint in a suit on a note avers that the defendant made and delivered the note to the plaintiff, and that the plaintiff is still the owner and holder, the allegation that plaintiff is the owner and holder is but a

[1] Cited, Poorman v. Mills, 35 Cal. 121; Hook v. White, 36 Cal. 302.

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conclusion of law, and an answer denying it but admitting the other allegations of the complaint, raises no material issue.

IDEM.—Such answer should be stricken out on motion as irrelevant, and plaintiff is entitled to judgment on the pleadings, even if there is an averment in it that the action is not prosecuted in the name of the real party in interest, and that another person owns the note.

SHAM ANSWER.—If the complaint avers that defendant made and delivered the note to plaintiff, and that plaintiff is still the owner and holder, and the answer denies that plaintiff is the owner and holder, and the plaintiff introduces affidavits showing by a statement of facts that the note is his, and the defendant's counter-affidavits merely state that the answer is true and was put in in good faith, the answer is sham, and should be stricken out as such.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

The facts are stated in the opinion of the Court.

Charles Wittram, for Appellant.

The District Court erred in striking out defendant's answer as sham and irrelevant, and ordering judgment thereon against him, and in doing so exceeded its jurisdiction. The answer presents material issues of fact to be tried by jury. The answer controverts material allegations in the complaint, and sets up new matters in defence. The answer contains a full and complete defence to the cause of action set forth in the complaint as to the plaintiff. The answer is not fictitious or interposed for the purpose of delay. The answer is *bona fide*. The answer is sworn to as true. The answer, therefore, is not sham or irrelevant. (Pr. Act, secs. 4, 153, and 155; 7 Cal. 551; 10 Cal. 347; 12 Cal. 98; 13 Cal. 588; 15 Cal. *9, 344; 18 Cal. 126; 29 Cal. 194; 11 Abb. Pr. 417–85; [570] 15 Abb. Pr. 280; 1 Johns. 139; 2 Wend. 158; 10 Wend. 87; 11 Wend. 478; 12 Wend. 156; 2 Code Rep. 65; 1 Hilt. 235; 2 Duer, 160; 5 Duer, 168; 5 Sandf. 52; 1 E. D. Smith, 364; 3 Bosw. 560; 4 How. Pr. 63; 10 How. Pr. 233; 24 Barb. 665; 27 Barb. 82; 20 N. Y. 268; 15 Dana, 45; 10 Mass. 287; 3 Pick. 83; 20 Ill. 499.) The order and judgment of the District Court erroneously deprived the defendant of his lawful rights. Because the defendant's answer is in all respects as required by law. Because the answer presents issues of fact which entitle the defendant to a trial by jury in the ordi-

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nary mode, and as provided by the Constitution and laws of the land. (Const. U. S. Art. VII.; Const. Cal. Art. I., sec. 3; Pr. Act, secs. 153 and 155; Broom on Par. 42.) Because the affidavit of the defendant, in opposition to the plaintiff's affidavit and motion to strike out the answer, was sufficient to defeat the motion. (18 Cal. 385.)

J. W. Winans, for Respondent

The authority of the Court below to strike out the answer as sham or irrelevant, under section fifty of the Practice Act, is sustained by all the cases. The language of said section fifty is taken *totidem verbis* from section one hundred and fifty-two of the New York Code, and the decisions made thereunder are therefore directly in point. A mere denial in the answer that plaintiff is the owner and holder of the note, is irrelevant and sham. (Cutler *v.* Gunter, 1 Denio, 268; Seeley *v.* Engle, 17 Barb. 530; Edson *v.* Dillaye, 8 How. Pr. 273.) An averment that plaintiff is not the real party in interest, but holds as agent for another, even though that other is named, unless the facts are stated which deprive the plaintiff of the right to sue, is irrelevant and sham. (Ramsdale *v.* Clapp, 7 Barb. 482, 484; Butterfield *v.* McComber, 22 How. Pr. 153, 154; Bentley *v.* Jones, 4 How. Pr. 202, 204.) Where the averment of ownership, in the complaint, is absolute and unequivocal [571] and *supported by the oath of positive knowledge, and that in the answer is on information and belief, defendant, on a motion to set aside the answer as sham, is bound to support his averment by the oath of a party having knowledge. (People *v.* McComber, 15 How. Pr. 189; Hance *v.* Rumming, 2 E. D. Smith, 48, 49; Chapin *v.* Palmer, 12 How. Pr. 37, 39, and cases therein cited; Corbett *v.* Eno, 13 Abb. Pr. 65.)

By the Court, SAWYER, J.:

This is an action upon a promissory note by the payee against the maker. The complaint avers the making and delivery of the note by the defendant to plaintiff, setting out a copy, then avers "that plaintiff is now the owner and holder of said promissory note," that no part had been paid, etc., and prays judgment for the amount due. The complaint is veri-

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fied. The answer denies "upon information and belief that the plaintiff is the owner of the note," but does not deny any other allegation. It then affirmatively avers on information and belief, that one R. S. Corning was, at the commencement of the action, and still is, the owner of the note, and that the action is not prosecuted in the name of the real party in interest, but that the plaintiff holds said note as the agent of Corning. But it avers no facts showing Corning to be owner, or out of which the transaction arose. On the pleadings, and an affidavit directly and positively contradicting the general averments of the answer, and stating further that the note was originally given on account of an indebtedness due from defendant to Corning, but that said indebtedness had already been transferred to the plaintiff by said Corning, in part payment for money advanced by plaintiff to Corning, the plaintiff moved to strike out the answer as sham and irrelevant, and for judgment. Defendant replied by affidavit stating "that he believes the averments contained in his answer herein to be true," that the matters were set up in good faith, and that he expects to support the averments by competent proof, but without stating any facts upon which his belief is based, or contradicting directly, or even upon *information or belief, any of the specific facts stated in plaintiff's affidavit as to the consideration of the note, and the assignment thereof to plaintiff by Corning before the note was given. [572]

The Court struck out the answer and entered judgment for plaintiff, and defendant appeals. We think the plaintiff entitled to judgment. The averment, that the plaintiff was the owner of the note, is not the averment of an issuable fact. It is but the averment of a conclusion of law, which followed from the other facts averred. It was immaterial, and might have been omitted. The conclusion of law necessarily followed from the other facts stated. The denial of this averment of a conclusion of law did not raise a material issue. The material facts were all admitted, and judgment must necessarily have followed, notwithstanding the denial of the legal conclusion. Upon this point, Mr. Justice Duer, in Catlin v. Gunter, 1 Duer, 265, says: "It has, however, been insisted,

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that no amendment of the answer was necessary in the present case to let in the defence of usury, but that, striking from the answer all the specific allegations which the proof failed to sustain, the defence was admissible under the general denial which the answer contains, that the plaintiff was the lawful holder and owner of the note, and that the defendant was indebted to him thereon in the sum claimed to be due or in any sum whatever. But these positions seem to us so manifestly groundless that, had not the defence of usury been specially pleaded, the answer would, in our opinion, have been plainly frivolous, and the plaintiff entitled to an immediate judgment. The answer controverts no material averment in the complaint. It admits the making and transfer of the note, and its possession by the plaintiff, and these are all the facts which the plaintiff was bound to aver, and, if denied, to prove, in order to maintain his action. Hence the denial in the answer, that the plaintiff was the lawful owner of the note, and that the defendant was indebted to him thereon, raised no issue of fact whatever, but was a denial merely of a conclusion of law which, as such, the Judge upon the trial, so far from admitting evidence under it, was bound to dis-
[573] regard *as irrelevant and nugatory. We are in the constant habit of striking out such a denial as irrelevant or frivolous, and we believe that the same construction has uniformly been given to it by the Judges of the Supreme Court. (Beers *v.* Squire, 1 Code Rep. 84; McMurray *v.* Gifford, 5 How. Pr. 14; Buddington *v.* Davis, 6 Id. 402.)

In Seeley *v.* Engell, 17 Barb. 530, the complaint contained an allegation of ownership of notes, and the answer a denial of ownership, precisely like those in this case. The referee excluded evidence offered by defendant to show that the plaintiff was not the owner of the notes, to which ruling defendant excepted. In considering the question the Court say: "On the part of the defendant, evidence was sought to be given by him that the plaintiff was not the lawful holder and owner of the note. These offers were repeated in various forms, but substantially to the same effect, and the referee excluded the testimony offered on the ground that the answer was insufficient to admit the evidence. Upon the authority of various

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cases cited on the argument, we think this ruling was right. (See 5 Sand. 646; 8 How. Pr. 273; 7 Barb. 482; 4 How. Pr. 202; 4 N. Y. 249.)" We think these views correct.

The denial clearly raised no material issue of fact. The affirmative allegations of the answer were but an averment of the same matter in an affirmative form. It averred certain legal conclusions already stated, but presented no new issuable facts. There was nothing which obviated the legal conclusion, which followed, necessarily, from the facts averred in the complaint, and admitted by the answer. On the admitted facts the plaintiff was entitled to judgment. There was no issuable fact presented by the answer relevant to the case made by the complaint. The answer was, therefore, properly struck out as irrelevant under section fifty of the Practice Act. If it could be regarded as good in form, it was also manifestly sham within the rules upon the subject. Without further discussion, the following additional cases are referred to bearing upon these points: People *v.* McComber, 18 N. Y. 320; Russell *v.* Clapp, 7 Barb. 482; Bentley *v.* Jones, 4 How. Pr. 202; *Hance *v.* Rumming, 2 E. D. Smith, [574] 48; Corbett *v.* Eno, 13 Abb. Pr. 65; Eliz. Manuf. Co. *v.* Campbell, 13 Abb. Pr. 92; Gostorfs *v.* Taaffe, 18 Cal. 387. The note was payable to plaintiff, and does not appear, by averment or otherwise, to have ever been assigned. The judgment is therefore right, under the principles announced in Corcoran *v.* Doll, ante 82.

Judgment affirmed.

Neither Mr. Justice RHODES nor Mr. Justice SHAFTER expressed any opinion.

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A. F. SHRIVER v. J. O. LOVEJOY AND J. A. GRANDVOINET.

[1] JOINT MAKERS OF NOTE ALL PRINCIPALS.—In an action on a promissory note against several joint makers, neither can show in defence that as between him and the other joint makers he was only a surety.

IDEM.—All the makers of a joint and several promissory note, as between themselves and the payee, are regarded as principals.

IDEM.—If one of the joint makers of a note signed as a surety for the others, and the payee sue all, and attach enough of the property of the principals on the note to secure his pay, and then release it, the surety is not thereby discharged.

APPEAL from the District Court, Thirteenth Judicial District, Mariposa county.

The following is a copy of the note sued on:

"$1500 00–100.

"On or before the 1st day of May, A.D. 1865, we, or either of us, promise to pay A. F. Shriver, or order, the sum of fifteen hundred dollars in gold coin of the United States, with interest thereon at the rate of two per cent. per month from date until paid, for value received.

"LOVEJOY & Co.,
"January 4th, 1865. GRANDVOINET."

The defendant Grandvoinet appealed.

The other facts are stated in the opinion of the Court and in the concurring opinion.

[575] **Patterson, Wallace & Stow*, for Appellant.

"When an individual becomes a party to a note or bill at the request and for the benefit of another, the relation of principal and surety exists, *and must be regarded by all other parties affected with notice.*" (Pitts *v.* Congdon, 2 N. Y. 354; citing 21 Wend. 504, Griffith *v.* Reed, where Mr. Justice Bronson said: "It has long been settled that a man may become a party to a promissory note or bill of exchange as a surety, *and* that he is entitled to all the privileges applicable to that character as fully as though he were surety in a dif-

[1] Cited, Damon v. Pardow, 34 Cal. 281.

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ferent form of contract;" citing Paine *v.* Packard, 13 Johns. 174; King *v.* Baldwin, 17 Id. 384; Manchester Iron Co. *v.* Sweeting, 10 Wend. 163; 13 Id. 365; Id. 401; see to same effect, Harris *v.* Brooks, 21 Pick. 195; Carpenter *v.* King, 9 Met. 51; Grafton Bank *v.* Kent, 4 N. H.; Branch Bank *v.* James, 9 Ala. 949.) Parsons on Bills and N., p. 234, Vol. I., concludes, the weight of authority and principle is in favor of the admission of evidence to prove that one of two joint makers was surety; *provided*, the holder knew such fact before the maturity of the note. (Wheat *v.* Kendall, 6 N. H. 504; 6 Ham. 17; 5 Id. 107; and the numerous authorities collated in note "e," Vol. I., pp. 234–35, Par. on Bills and N.) "When it does not appear on the face of the paper that the party is a surety, notice of the character in which he contracted must of course be brought home to the holder before he can be affected by it." (21 Wend. 504.)

George Cadwalader, for Respondent.

In the case of Dane *v.* Corduan, 24 Cal. 165, Mr. Justice SAWYER, in delivering the opinion of the Court, said: "When a party contracts jointly with another, as in this case, as between himself and the creditor, he is the principal debtor—he expressly undertakes to pay the debt." Grandvoinet, of course, under this decision is not a surety, but a principal. Dane *v.* Corduan reviews a number of the cases cited by appellant, and holds that the alleged surety must pay the debt *before he has any rights of action against the [576] person claimed by him as the principal obligor; or that he may proceed under the five hundred and twenty-seventh section of the Pr. Act to compel such obligor to satisfy the debt. Dane *v.* Corduan, with And *v.* Magruder, place Grandvoinet in the position of the principal debtor. As the relation of principal and surety cannot exist in this case, it is out of place to quote authority going to show what the consequences would be if the relation existed.

By the Court, RHODES, J.:

The plaintiff sued Lovejoy—the surviving partner of Lovejoy & Co.—and Grandvoinet, upon a joint and several prom-

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issory note made by Lovejoy & Co. and Grandvoinet to the plaintiff. Grandvoinet relied for a defence mainly on the fact that Lovejoy & Co. were the principal debtors, that he was only their surety, and that the plaintiff, after having commenced this action and attached sufficient property of Lovejoy to satisfy the demand, released the property from the attachment, and the same was attached by other creditors of Lovejoy. The Court gave judgment for the plaintiff.

All the makers of a joint and several promissory note, whatever may be their true relation between themselves, stand, as to the payee, as principals. The promise of each is an absolue and primary promise, not a conditional or secondary promise. The creditor is not interested in knowing the relation of the makers with each other. In a suit on the note, he ought not to be delayed by an investigation into matters which do not concern him. The Practice Act does not provide the necessary machinery for conducting that sort of a triangular litigation. When one maker alleges that he is a surety, how is another maker to deny the allegation? He may be prepared to disprove it; but how can he be permitted to do so, unless he takes issue upon it? The law interposes a denial of the new matter of the answer in behalf of the plaintiff, but we have never heard that it [577] is also deemed to be denied by *the other defendants.

If the suretyship can be alleged, it must, if proven, be found as a fact, and the judgment must be in accordance with it, though the fact found be contrary to the tenor and effect of the note on which the recovery is had. It would better accord with the rules of pleading and evidence, to render judgment on the contract that the makers of the note entered into with the payee, rather than such as they may have made among themselves. These matters cannot be inquired into in a suit on the note. (Aud *v.* Magruder, 10 Cal. 288; Dane *v.* Cordua, 24 Cal. 164.) The authorities upon this point were reviewed at some length in the last case cited, and although the cases are not uniform, yet the doctrine is so firmly based upon principle, and so fully sanctioned by commercial usage, that we regard a further review as useless and idle.

As he was not entitled to show that he was not a principal,

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but that as between himself and Lovejoy & Co. he was merely their surety, he had no better right than Lovejoy to complain of the release of the attachment, and he is not entitled to avail himself of that fact in this action in any other manner or for any other purpose than could Lovejoy, who certainly could not set it up as defence to the action.

Judgment affirmed.

Mr. Justice SHAFTER delivered the following opinion, concurring specially, in which Mr. Justice SAWYER concurred:

I concur in the judgment, on the ground that it is found by the Court, and on what I consider sufficient evidence, that the appellant was not a surety, but a principal party to the note. On the question discussed in the opinion of brother RHODES, I refrain from expressing an opinion.

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*PIO PICO *v.* NICOLAS COLIMAS, ANTONIO CANTO AND O. P. PASSONS. [578]

PLEADINGS.—If the complaint is sworn to, a general denial in the answer admits all its material allegations.

TRESPASS ON LANDS.—If the complaint, in an action to recover damages for an alleged trespass, avers that the defendant unlawfully entered on plaintiff's land and tore down a gate, the gist of the action is the entry, and the removal of the gate is mere matter of aggravation; and if the plaintiff fail to prove the gist he cannot recover for the matter of aggravation.

JUSTIFICATION OF TRESPASS.—In trespass *quare clausum fregit*, where the complaint avers matter of aggravation after the entry, an answer justifying the aggravating matter, but admitting plaintiff's title and possession, does not state facts sufficient to constitute a defence.

EASEMENT.—One who owns an easement upon the land of another has a right to enter on the land to keep the easement in repair, but aside from this and analagous purposes, he has no right of entry.

ANSWER IN TRESPASS.—In trespass *quare clausum fregit*, an answer justifying merely because the defendant has an easement on the land, contains no defence.

IDEM.—An answer justifying a trespass on the ground of official duty should aver that the defendant is an officer, and what his official duty is. If there are other defendants, and the answer is intended to apply to them, it should state that they entered in aid of the officer.

WATER COMMISSIONER.—A Water Commissioner appointed under the Act of May 15th, 1854, to regulate watercourses, etc., has no power, as such, to repair a watercourse or to remove an obstruction from it.

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APPEAL from the District Court, First Judicial District, Los Angeles county.

The plaintiff was the owner of a tract of land called the "Ranchito," in Los Angeles county, formerly granted to Juan Crispin Perez by the Mexican Government. Across the "Ranchito," at the time of the commencement of this action and previously, there ran a certain *zanja* or watercourse, partly artificial and partly natural, known as the "*Zanja de San Samuel*," through which flowed water taken from the San Gabriel River to lands owned by the defendants, Colimas, Passons, and others. The water flowing through this *zanja* was used for irrigation. Plaintiff in 1866 placed across this *zanja* on the "Ranchito," a water gate for the purpose of turning water out of the same to irrigate his lands. The defendants claimed that he had no right to do so, and that they were entitled to the use of the water, and entered
[579] *upon the "Ranchito" and removed the water gate.

Judgment was rendered in favor of the defendants in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion of the Court.

Glassell & Chapman, for Appellant.

The facts found, and the admissions of the pleadings show conclusively, that the plaintiff was the owner and possessor of the land on which was the *zanja* referred to. Hence, *prima facie*, the plaintiff had the right to the reasonable use of the water therein for irrigating his said lands. (Ang. on Wat. C. secs. 5, 8, 142; Wash. on Eas. pp. 238–9, 234–5.) The interference by defendants with this *prima facie* right of plaintiff is declared in the findings and admitted by the pleadings. Thereby the burden is cast upon the defendants to *avoid* the consequences of this interference. The only matter sufficiently pleaded or set up for this purpose is the alleged concession to defendants of the exclusive right to this *zanja*, which allegation is not found to be true. As to the pleadings, see Coles *v.* Saulsby, 21 Cal. 50; Smith *v.* Owen, 21 Cal. 11; Piercy *v.* Sabin, 10 Cal. 22, and Id. 303; Green *v.* Palmer, 15 Cal. 411. The evidence equally fails to establish any defence

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or justification under the authority of alleged Water Commissioners. None of the acts requisite for the establishment of such a claim have been proven. As to what some of these requisites are, see Wash. on E. pp. 327–8; Ang. on W. C. secs. 475–7; Bensley *v.* M. Lake W. Co., 13 Cal. 313.

V. E. Howard, for Respondents.

By the Court, SHAFTER, J.:

This is an action to recover damages for an alleged trespass upon a tract of land in the county of Los Angeles, known as "The Ranchito." It is charged that the defendants unlawfully entered upon said lands and tore down the gate of a *certain *zanja*, or ditch, crossing the same, and [580] used by the plaintiff for the purpose of irrigation. The general denial contained in the answer must be disregarded, for the complaint was sworn to. The plea of a former action pending requires no attention, for there was no evidence tending to prove it. There were two defences stated in the answer, however, with reference to which evidence appears to have been taken at the trial, and those defences are made topics of discussion and controversy here. The first of these defences admits that "The Ranchito," the *locus in quo*, is the property of the plaintiff, and that the *zanja* mentioned in the complaint crosses the said place; and it is averred that the *zanja* is a servitude thereon; that said servitude is vested in the defendants, and that the plaintiff has no right or title to the ditch nor to the use of the water running in it. In the statement of the second defence the defendants "*admit* that the defendant Colimas is a Water Commissioner, or *Zanjero*, for the District of Nietos, in which the *zanja* is situate, duly chosen and qualified; and they allege that said Colimas, in the rightful discharge of the duties of his office, removed from the said *zanja* one or more water gates which said plaintiff had, without right, and contrary to law, erected on said water ditch, and by means of which plaintiff or his agents were wrongfully diverting the water from said *zanja* and these defendants."

First—The gist of the action is the alleged entry upon the

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Ranchito. The removal of the gate from the *zanja* is not any part of the cause of action, but is mere matter of aggravation. (Taylor *v.* Cole, 3 T. R. 292; 2 Hil. on Torts, 221.) Failing to prove the gist, there could be no recovery by the plaintiff for the injury to the *zanja*, (Eames *v.* Prentice, 8 Cush. 337; Carpentier *v.* Mendenhall, 28 Cal. 484,) and a special defence not justifying the real *gravamen* of the action would be no justification in effect. Now, the first plea admits that the title to and possession of the *locus in quo* were in the plaintiff, and seeks to justify the entry of the defendants thereon, on the ground simply that they had the right to an existing watercourse thereon for the purposes of irri-
[581] gation. *But it does not follow from defendants' ownership of the easement alleged, that they had the right to enter upon the "Ranchito" at will, or irrespective of occasion. If the defendants owned the easement, they had the right to enjoy it. (Wood *v.* Truckee T. Co., 24 Cal. 474.) As ancillary to a reasonable enjoyment of it, they had the right to enter upon the "Ranchito" for the purpose of keeping the *zanja* in repair, or freeing it from obstructions prejudicial to the easement. But aside from these and analogous purposes, the defendant had no right to enter upon the lands affected by the servitude. To hold otherwise, would be to clothe the defendants with rights not involved in the servitude, nor deducible from it. (Atkins *v.* Boardman, 2 Met. 457.) The plea in question states the easement and stops. It should have kept on and averred, if such was the fact, that the defendants' enjoyment of the easement was impeded by the gate named in the complaint; and that the entry complained of was made for the purpose of removing the obstruction; and that nothing was done either to the gate or land except what was necessary to accomplish that result. (2 Ch. Pl. 569.) The plea, then, is substantially defective. It neither justifies the entry upon the "Ranchito" nor the demolition or removal of the gate of the *zanja*, assuming that to be the gist, or of the gist, of the action. Further, the matters omitted in the plea are not found by the referee to have existed as facts, nor was there any evidence tending to prove that the defendants had an exclusive right as alleged to all

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the water running in the *zanja*, however the supply might be in excess of defendants' needs; nor was there any evidence that the defendants entered upon the *locus in quo* as owners of the easement, and for the purpose of removing an impediment to its beneficial enjoyment. To the contrary, the evidence was that the defendant Colimas "took up the gate for the reason that he was *Zanjero*"—that is, on the ground of official duty, and not on the ground of personal right.

Second—The second special defence is also fatally defective. In the first place, it is not pleaded as a defence to the real *cause of action—the entry upon the Ran- [582] chito—but to the removal of the water gate, a matter of aggravation, as we have seen. In the second place, the plea is not interposed for the benefit of all the defendants, but for the protection of Colimas only. Nor do the other defendants justify as having entered upon the land, or acted in the removal of the gate, in aid of Colimas as "*Zanjero* or Commissioner." In the third place, under the statutes of this State, a Water Commissioner has no power, as such, to repair or to remove an obstruction from a watercourse. That duty, if devolved upon any one, is cast upon another and distinct functionary called an "overseer," who is the executive officer of the statute system. (2 Hitt. 7278.) In the fourth place, the plea does not aver that Colimas was a Commissioner, it simply "admits" it. But the complaint does not charge it. In the fifth place, it is not averred that the removal of the gate, which Colimas attempts to justify, is the removal mentioned in the complaint. In the sixth place, the averments are mainly of conclusions of law. To all this it may be added that the defence, as presented in the evidence, is as imperfect as the statement of it in the plea.

Judgment reversed, and new trial ordered, with leave to the defendants to amend their answer.

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THE CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA *v.* THE BOARD OF EQUALIZATION OF PLACER COUNTY.

RETURN TO WRIT OF CERTIORARI.—A Clerk of the Board for the Equalization of Taxes, in answer to a writ of certiorari requiring the Board to certify the proceedings had before them in relation to equalizing the value of property, can return only a transcript of such documents, orders, etc., as remain of record or on file in his office. It is not made the Clerk's duty to take down or preserve the evidence.

IDEM.—If the Board for the Equalization of Taxes do not take down and preserve the evidence in a matter of equalization of a tax, and have the same filed with their Clerk, the evidence cannot be certified by the Clerk in his return to a writ of certiorari.

EVIDENCE BEFORE BOARD OF EQUALIZATION.—The statute does not require the Board of Equalization to take down or preserve the evidence taken before them, nor does it make any provision for settling a statement of a trial before them,
[583] or *a bill of exceptions taken during its progress; but doubtless some mode might be adopted to authenticate the evidence when required on appeal.

CERTIORARI to the Board of Supervisors of Placer county, sitting as a Board for the Equalization of Taxes.

The Central Pacific Railroad of California, starting from Sacramento on its way east, passes through the county of Placer. The Treasurer of the company, in the spring of 1866, reported to the Assessor of Placer county forty and a half miles of railroad in said county liable to taxation, and estimated its value at six thousand dollars per mile, making a total value of two hundred and forty-three thousand dollars. The Assessor assessed the road at that amount. On the complaint of the District Attorney, the Board for the Equalization of Taxes raised the tax to six hundred and seven thousand five hundred dollars. The railroad company appeared by its attorneys before the Board on the proceeding to equalize the tax, and a large amount of evidence was taken. The same was not taken down or preserved. The Clerk in his return did not embody the evidence.

The other facts are stated in the opinion of the Court.

Robert Robinson, for Petitioner.

Hale & Fellows and *E. L. Craig*, for Respondents.

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By the Court, Rhodes, J.:

The writ in this case required the Board to certify the proceedings had before them, relating to the equalizing of the valuation of the property of the railroad company, and all things touching the same, as fully and entirely as the same remained before them, "and also the orders, process, judgment proceedings, and evidence therein." The return was made by the Clerk of the Board, who certifies that the same is a full, complete, and true transcript of all the matters required by the writ to be certified, "as the same are and remain of record *and on file" in his office. The petitioner [584] moves for a further return to the writ, on the ground that the return already made is defective, because it does not contain the evidence on which the Board acted, in increasing the valuation of the property. It is not asserted that the evidence produced before the Board was taken in writing, or that it was preserved in any manner whatsoever, or is to be found in any document under the control of the Board or their Clerk. The writ is directed to an inferior tribunal, Board, or officer exercising judicial functions, and section four hundred and fifty-eight of the Practice Act provides that "when directed to a tribunal, the Clerk, if there be one, shall return the writ with the transcript required." The Clerk can return a transcript only of such documents, orders, etc., as remain of record or on file in his office. It is not made his duty to take down or preserve the evidence in a matter of equalization. Nor is the Board required to preserve the evidence; nor is any provision made for the settlement of a statement or a bill of exceptions; but doubtless some convenient and proper mode might be adopted for the preservation and authentication of the evidence, when it was desired to have the proceedings reviewed. Nothing of the kind seems to have been done in this case, and consequently the evidence cannot be certified to this Court. The statute prescribes the mode of procedure in a writ of certiorari, and it contains no provision requiring the inferior tribunal to prepare a statement of the evidence to be annexed to the return, in any manner analogous to that required of a Justice of the Peace under the practice formerly

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prevailing in the State of New York, when it was desired to have his proceedings reviewed by the Court of Common Pleas. There is no case under our system of practice in which the evidence in a cause or proceeding goes to the appellate Court, unless the parties interested have prepared a statement or bill of exceptions, and had it settled in proper time and manner.

Motion denied.

[585] *Mr. Chief Justice CURREY and Mr. Justice SANDERSON dissenting:

We dissent. (Blair v. Hamilton, ante 49; 14 Cal. 479; 15 Cal. 300.)

D. GHIRADELLI v. JOHN L. BOURLAND et als.

MISJOINDER OF CAUSES OF ACTION.—If the complaint in an action against a Sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action.

COMPLAINT ON SHERIFF'S BOND.—A complaint in an action against a Sheriff and his sureties for an alleged trespass of the Sheriff, which avers that the other defendants than the Sheriff are the securities on his official bond, does not state a cause of action against the Sheriff on the bond.

IDEM.—A complaint in an action against a Sheriff and his sureties for an alleged trespass of the Sheriff, which merely avers that the sureties are the securities on his official bond, and that the same was duly filed, executed, and recorded, does not state a cause of action on the bond.

IDEM.—A complaint in an action against a Sheriff and his sureties for an alleged trespass of the Sheriff, should allege that the bond was the Sheriff's official bond, and set out enough of its contents to show that those who signed it were bound to indemnify parties injured by the Sheriff's malfeasance.

APPEAL from the District Court, Fifth Judicial District, Tuolumne county.

The following is a copy of the material portion of the complaint in this action:

"And for cause of complaint, the said plaintiff avers that heretofore, to wit, on the 17th day of August, A. D. 1866, at the city of Sonora, county and State first aforesaid, he was the owner of and in the quiet and peaceable possession of a

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certain stock of goods, wares, and merchandise, as well also machinery and tools for the manufacture of syrup, in all of the value of about twenty-five hundred dollars lawful money of the United States (a schedule of said articles with their values being hereunto attached and made part of this complaint.)

*"That being so the owner, and in the possession of [586] said property at, etc., aforesaid, the said defendant, John L. Bourland, then and still being the Sheriff of said county, by virtue of certain alleged legal process not against this plaintiff, forcibly, wrongfully, and against the will of plaintiff, took and converted said property, to the great damage of plaintiff, to wit, his damage three thousand dollars.

"And the plaintiff avers that he did, on the 18th day of August, A. D. 1866, at, etc., aforesaid, in writing demand of the said Bourland a return of said property, which demand the said Bourland refused.

"And the said plaintiff further avers that heretofore, to wit, on the 2d day of March, A. D. 1866, the said defendants, Josiah Hall, S. S. Turner, T. N. Willis, John Shaw, C. Labetoure, J. M. Gaudin, M. E. Hughes, John Hurd, John Wolfling, and H. C. Schultz, became, and ever since hath been, the securities on the official bond of the said defendant, Bourland. That said bond was duly filed, executed, and recorded in the manner prescribed by law. That by reason of the acts of the said Bourland, the terms and conditions of the said bond have become and are broken, and the said defendants, the securities as aforesaid, have become, jointly with the said Bourland, liable to pay to the plaintiff the damages sustained by him as aforesaid, together with interest."

The defendants appealed from the judgment.

The other facts are stated in the opinion of the Court.

H. P. Barber, for Appellants.

The first question which naturally arises is whether this action sounds in tort or contract. If in tort, the pleading is bad, as not showing that *any* of the defendants, except Bourland, have committed any tort. If in contract, it is equally

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faulty in not setting forth the bond, showing its conditions, or even alleging that it was ever signed or executed by the other defendants or Bourland at all. The second portion of the complaint is a pure suit upon *contract* against all the [587] *defendants *except* Bourland, it not being even alleged that he signed or executed the bond, though the complaint states that defendants are *jointly* liable. (Sacramento *v.* Dunlap, 14 Cal. 421.) The action is brought upon the supposed bond—the liability of defendants is asserted in the complaint to be *joint*. The complaint is faulty in not showing that *all* the defendants executed it. (1 Ch. Pl. 44.) The bond is not set forth in the complaint, nor is it shown what *conditions* it had. This is undoubtedly requisite. (Western Bank *v.* Sherwood, 29 Barb. 383.) It is not very difficult to say what would be the judgment of a common law court on this complaint. (Miller *v.* Van Tassel, 24 Cal. 458; People *v.* Jackson, 24 Cal. 630; Forrest *v.* Mayor, etc., 13 Abb. Pr. 350; Lynch *v.* Murray, 21 How. Pr. 154.) It has *hitherto* been considered requisite in declaring on a written instrument to set forth at least *some* of its conditions. In the present case, we find nothing except that the co-defendants of Bourland have become securities on his "official bond." And what were the conditions of his "official bond?" The rights of sureties are *strictissimi juris*, and they are bound to no more than they have *agreed to*. (Tarpey *v.* Shillenberger, 10 Cal. 390; People *v.* Buster, 11 Id. 215; Schloss *v.* White, 16 Id. 68.) What *ought* to be contained in an "official bond" and what *may* be in it are two very different things, as Sacramento *v.* Dunlap clearly shows.

E. F. Hunter, for Respondent.

I do not propose to discuss the sufficiency of the complaint as against the defendants other than Bourland, for they having demurred to the complaint jointly with Bourland, and a good cause of action being sufficiently stated against him, they, the other defendants, are bound with him to the same degree as if the objection came for the first time after verdict. If, however, the Court should differ with me upon this proposition, the judgment should be affirmed as against Bourland; and in

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case of his insolvency, preserve to plaintiff his remedy upon the official bond.

*By the Court, SHAFTER, J.: [588]

It is alleged in the complaint that the plaintiff was the owner and in possession of certain personal property particularly described; and that the defendant Bourland, "still being Sheriff of said county, (Tuolumne,) by virtue of certain alleged legal process, not against this plaintiff, forcibly, wrongfully, and against the will of the plaintiff, took and converted said property, to the damage of the plaintiff three thousand dollars." It is further alleged that the other defendants, ten in number, on the 2d day of March, 1866, "became and ever since have been the securities on the official bond of the said defendant Bourland, that said bond was duly filed, executed, and recorded in the manner prescribed by law; that by reason of the acts of said Bourland the terms and conditions of the said bond have become broken, and the said defendants, the securities as aforesaid, have become, jointly with the said Bourland, liable to pay to the plaintiff the damages sustained by him as aforesaid, together with interest."

The complaint was demurred to on the ground of uncertainty, misjoinder of causes, and want of facts. The demurrer was overruled, and the defendants answered. At the trial the plaintiff recovered a verdict, and judgment was duly entered thereon.

The complaint was defective on all the grounds named in the demurrer. The defendants, other than Bourland, were charged *ex contractu* as "securities on Bourland's official bond," and not otherwise. As to Bourland, he was charged as a trespasser, and not otherwise. It is not alleged that he signed the bond, nor that the other defendants participated in the trespass. The averment that the bond was "Bourland's official bond," and that the other defendants "have become jointly liable with Bourland to pay the damages sustained by the plaintiff, as aforesaid," does not bring Bourland into contract relations with the bond, nor the other defendants into relations with the trespass. The grounds of the "joint liability" alleged are not disclosed. The "joint liability" is

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[589] *but a legal conclusion, put in a form the most general and abstract. There is thus a misjoinder of causes.

Again, though the trespass is well laid against Bourland, the contract liability counted on is not well laid against the other defendants. There is not a fact stated as a ground of the liability alleged. There is no allegation that the defendants signed the bond, nor that they executed it, nor that they made it. That they were "securities" on the bond is but a conclusion, and is not issuable. But further, what may be called the facts of the bond, that is, its provisions, are set out, neither in *hæc verba* nor in words assumed by the pleader to be of equivalent import. We are told merely that the bond was the "official bond of Bourland," and that "its terms and conditions have been broken."

Further still, it does not follow that the official bond referred to was a Sheriff's bond; nor have Sheriff's bonds any fixed scope *à priori*. *Non constat* but Bourland may have held some other executive office than that of Sheriff, and have given an official bond for the performance of its duties. Or, if the bond named must be understood to be a Sheriff's bond, then *non constat* that it bound those who signed it to indemnify parties injured by the Sheriff's malfeasances.

There are other points of view from which the complaint may be criticised, and which the counsel of the appellants have not failed to urge; but it is not necessary to remark upon them here, for the insufficiency of the complaint is made out to our conviction on the grounds already considered.

Judgment reversed, and cause remanded, with leave to the plaintiff to amend his complaint.

Mr. Justice RHODES did not express any opinion.

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*THOMAS W. MORE v. PETER MASSINI et als. [590]

DAMAGES CAUSED BY TRESPASS ASSIGNABLE.—A claim for damages caused by a trespass on land is assignable, and the assignee may maintain an action to recover the same.

INJUNCTION TO PREVENT A THREATENED TRESPASS.—An action will lie to enjoin a threatened trespass on land, where the trespass, if committed, would destroy the substance of the land, which could not be specifically replaced.

[1] JOINDER OF ACTIONS IN COMPLAINT.—The owner of land may join in the same complaint a claim for damages, as assignee, caused by a trespass on the land while it was owned by his grantor, and a claim for an injunction for a threatened injury to the land.

[1] JOINDER OF ACTIONS FOR INJURY TO PROPERTY.—The plaintiff may join in the same complaint a cause of action for distinct and independent injuries to property, and the property injured in each cause of action may be the same or different, and may be either personal or real.

INJUNCTION WHEN PLAINTIFF IS IN POSSESSION.—An injunction lies to restrain a threatened injury to real property in the nature of a waste, even if the plaintiff is in possession of the land.

The Court below sustained the demurrer to the complaint, the plaintiff declined to amend, and judgment was entered against him, and he appealed.

The other facts are stated in the opinion of the Court.

S. F. & J. Reynolds, for Appellant.

There was no misjoinder of causes of action. (Gates *v.* Kieff, 7 Cal. 124; Gray *v.* Dougherty, 25 Cal. 277.) The cause of action for the trespass was assignable. (Lazard *v.* Wheeler, 22 Cal. 139; McKee *v.* Judd, 2 Kern. 622; Hoyt *v.* Thompson, 1 Seld. 347; North *v.* Turner, 9 Sergt. & R. 244.) The refusal of an injunction, because the plaintiff is in possession, would deny an equitable relief in any action of trespass. (Willard's Eq. 369, 381–2.)

Casserly & Barnes, for Respondents.

The jurisdiction in equity invoked being purely ancillary, it will not be contended that two independent causes of action can be united in one complaint, though one is at common law and the other in equity. They must arise out of "the same

[1] Cited, Reed v. Union Cop. Min. Co., Cal. Sup. Ct. April T. 1870 (not reported.)

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transaction"—the one subject-matter. (25 Cal. 277.)
[591] This *is so self-evident as to dispense with authority or argument. So also the equities shown in the equitable part of the complaint must be such as may be invoked in respect or in aid of the cause of action at law. Thus, if the latter is for money due on a note, or for conversion of or in replevin for chattels, a bill will not lie for an injunction against the defendant, without showing some very special grounds to take the case out of the general rule that an injunction will not be granted against injuries to personal property, or injuries susceptible of full compensation in damages, there being no other equitable element, as multiplicity of suits, etc. (Leach *v.* Day, 27 Cal. 646–7; Robinson *v.* Russell, 24 Cal. 473; Tomlinson *v.* Rubio, 16 Cal. 206–7; Tevis *v.* Ellis, 25 Cal. 519–20; Waldron *v.* Marsh, 5 Cal. 119.) Such a bill would have been bad on demurrer, if separately brought under the old practice. Under the present, attempting to unite such a bill with a cause of action at law, would subject the whole complaint to the further objection of misjoinder. The alleged claim for damages was not assignable. (Oliver *v.* Walsh, 6 Cal. 456.) The wrong, which is the gist of the action, is purely personal to the party in possession, and was not assignable by him. (Rogers *v.* Spence, 13 Mees. & W. 571, 579–82; Clark *v.* Calvert, 8 Taunt. 742, 750–52; Martyn *v.* Williams, 38 E. L. E., 465–6, etc.; Sommer *v.* Wilt, 4 S. & R. 28; Commonwealth *v.* Shepard, 3 Penn. P. & W. 514; Sibbald's Estate, 6 Harr. 252–4.) As to the general non-assignable character of claims for unliquidated damages arising out of torts, see 2 Story Eq., sec. 1040, *g*, and notes, etc.; and Thurman *v.* Wells, 18 Barb. 500, 510, 511, 514; Gardner *v.* Adams, 12 Wend. 297; Hall *v.* Robinson, 2 N. Y. 293, 295, 296; Brig Sarah Ann, 2 Sumn. 211; Zabriskie *v.* Smith, 3 Ker. 322, 332–6; Whittle *v.* Skinner, 23 Vt. 531; People *v.* Tioga C. P., 19 Wend. 77, citing 2 Day, 293.

[592] *By the Court, SHAFTER, J.:

The complaint is in two counts. The first count is for damages caused by a trespass upon land prior to a conveyance thereof to the plaintiff. The plaintiff claims the dam-

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ages by assignment. In the second count, the plaintiff alleges that he is the owner of the lands, and that they are in his possession; that the defendants threaten to enter thereon, and to quarry and remove asphaltum therefrom, and that they will do so unless restrained. Wherefore, an injunction is prayed, etc.

The complaint was demurred to on the ground that neither count stated a cause of action, and that there was a misjoinder of causes.

First—The sufficiency of the first count is disputed upon the ground that the damages claimed therein are not assignable.

It is insisted that the point is covered by Oliver *v.* Walsh, 6 Cal. 456, and that after twelve years' acquiescence, the doctrine of that case ought not to be reopened to controversy.

It is true that the question presented in the case at bar is identical with that presented in the case cited; but the grounds of judgment now are not identical with those on foot in 1856, when the case cited was decided. The decision was made under the fourth section of the Practice Act, as amended in 1855. (Stat. 1855, pp. 30, 31.) The original section, passed in 1851, (Stat. 1851, p. 51, sec. 4,) was as follows: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act." By the amendment of 1855, it was provided that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act; but in suits brought by the assignee of an account, unliquidated demand or thing in action not arising out of contract, assigned subsequently to the 1st day of July, 1854, the assignor shall not be a witness in behalf of the plaintiff." The decision in Oliver *v.* Walsh proceeded upon a construction of this amendment. It is unnecessary for us to express any opinion as to *the [593] validity of that construction, for the amendment of 1855 has been entirely superseded by subsequent legislation. There is now no distinction between persons who are competent to bring actions and persons competent to testify in them when brought. But what is perhaps more to the purpose, the Legislature, by an act approved January 27th. 1864, took up

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the fourth section of the Practice Act and reënacted it in terms as passed in 1851, with the amendments of 1854 and 1855 left out. The question to be considered, then, is whether a claim for damages to real estate can be assigned under the fourth section of the Practice Act as it now stands.

The one hundred and eleventh section of the New York Code of 1848 was precisely the same as the fourth section of our Practice Act has been made to be by the act of 1863–64; and it was held in McKee *v.* Judd, 2 Ker. 625, that the right of action for a tortious conversion of personal property was assignable, and that the assignee might sue therefor in his own name under the one hundred and forty-eighth section of the Code referred to. In North *v.* Turner, 9 S. & R. 248, Mr. Justice Gibson remarked in delivering the opinion of the Court, as follows: "This is an action of trespass *de bonis asportatis*, and it is urged that the property in the damages expected to be recovered, being for a mere tort, is so peculiarly attached to the person as to be inseparable from it, and that consequently before an actual recovery of the damages there was nothing for an assignment to act upon. There are, undoubtedly, some injuries which so peculiarly adhere to the person of him who has suffered them, as to preclude an assignment of his claim to compensation for them; such, for instance, as slander, assault and battery, criminal conversation with a party's wife, and many others that might be mentioned. The right of compensation for any of these would not pass by a statute of bankruptcy or an assignment under the Insolvent Acts; nor could it be transmitted to executors or administrators. But this does not hold with respect to a trespass committed against a party's goods, the remedy for which [594] survives *to the personal representative by the statute, (4 E. 3, C. 7,) which clearly shows that such a cause of action is separable from the person of the owner."

By the one hundred and ninety-sixth section of our Probate Act, the right of action for trespasses committed on the real estate and in the lifetime of a person deceased, survives to his executor or administrator; and a claim for damages to personal or real estate would undoubtedly pass under an assignment by a petitioner in insolvency, of "all his property, real,

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personal, and mixed, for the benefit of his creditors." The survivorship in the one case, and the transfer in the other, clearly show that the cause of action in the respective cases is "separable from the person of the owner," and is therefore assignable by conclusion, according to the case cited from Pennsylvania. In Lazard *v.* Wheeler, 22 Cal. 142, though the question now under consideration was not directly presented, still it was said on the authority of McKee *v.* Judd and North *v.* Turner, that a right of action for the wrongful taking and conversion of personal property is assignable.

There can be no tenable distinction taken between trespasses affecting personal, and trespasses affecting real estate. Both are torts—the wrong is to property in both cases—the right of action survives in both, and under our system the argument drawn from the doctrine of champerty, which constitutes the very basis of the non-assignability of choses in action at common law, has no application to an assignment of a claim falling under either class. *Cessante ratione cessat lex.*

Second—The second count states a good cause of action. The gravamen is a threatened trespass upon land. The trespass is in the nature of waste, and it will be committed unless the defendant is restrained. Should the threat be fulfilled, the plaintiff would be deprived of a part of the substance of his inheritance, which could not be specifically replaced. In the class to which this case belongs, no allegation of insolvency is necessary. The injury is irreparable in itself. (Merced Min. Co. *v.* Fremont, 7 Cal. 322; Hicks *v.* Michael, 15 Cal. 116; Leach *v.* Day, 27 Cal. 646; People *v.* Morrill, 26 *Cal. 360.) Inasmuch as the plaintiff's rights to the [595] remedy by injunction has its origin in the nature of the injury complained of, it was of course unnecessary to aver matter merely adventitious. (Natoma W. & M. Co. *v.* Clarkin, 14 Cal. 551.)

Third—The demurrer for misjoinder of causes is not well taken.

By the seventh subdivision of the sixty-fourth section of the Practice Act, "injuries to property may be joined in the same complaint." By the very supposal, the injuries that may be so joined are independent and distinct. The property

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injured may be the same or different: it may be either personal or real. The title of the plaintiff to redress may be original in respect to one injury, while in respect to the other, or others, the right may have come to him by assignment. Some of the injuries complained of may be legal, while others may be of an equitable character. Trespass upon land is a legal injury: to threaten to enter upon and waste it is an equitable injury. But both may be joined in the same complaint, nevertheless, for the statute reason that both are "injuries to property." That general likeness is the only test to which the question of joinder, in cases like the present, can be subjected under our system. Under the New York Code, as amended in 1852, the right to join a cause of action in equity with a cause of action at law was made to depend upon whether "both arose out of the same transaction, or transactions connected with the same subject of action." (Voorhies' Code, sec. 167.) But there is no such restriction in our code. Nor do we understand that the existence of such restriction has ever been judicially determined by this Court. Gates *v.* Kieff, 7 Cal. 125, was an action of trespass *quare clausum fregit*. There was a prayer for damages, and also for an injunction based on proper allegations. It is true that the land with respect to which the injunction was prayed was identical with that upon which the trespass was committed, but that was a matter upon which no stress was laid either by the counsel or the Court. The appellant insisted that the
[596] complaint was *radically defective for the reason that the legal and equitable causes were not distinctly stated, and that was the only question presented and determined. Natoma W. Co. *v.* Clarkin, 14 Cal. 554, was an action of ejectment. There was a prayer for an injunction to restrain the commission of waste upon the premises pending the action. The Court say "that this blending of an action at law with a petition for ancillary relief to the equity side of the Court is admissible under our system of practice." But the Court did not determine, nor was it called upon to consider, whether the power to administer legal and equitable relief in the same action was confined to cases where the latter was merely cumulative or ancillary to the former on one continuous gist.

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The question was not raised. The same remark is applicable also to the decision in Gray v. Dougherty, 25 Cal. 266. In disposing of this appeal, however, it is not necessary to determine whether the legal and equitable relief to be granted in the same action, should relate to the same subject-matter or to the same transaction. It is enough that the plaintiff herein has succeeded to all the rights and stands in the shoes of the assignor and grantor. If the assignment and conveyance had not been made, then he under whom the plaintiff claims could have sued for damages for the trespass, and counted in the same action upon an equitable injury like the one complained of herein. That was the case in Gates v. Kieff, 7 Cal. 124.

Third—It is further claimed for the appellant that the plaintiff is not entitled to the equitable relief demanded, for the reason that the complaint shows him to be in the quiet and peaceable possession of the land.

The injury which the defendant threatens is irreparable by definition, and going as it does to the substance of the inheritance, it is a matter of indifference whether the plaintiff is in or out of possession.

Judgment reversed, and new trial granted.

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*FERDINAND VASSAULT v. FRANKLIN B. AUSTIN, MARY A. B. AUSTIN, AND MANSFIELD COMPTON. [597]

[1] ANSWER TO AVERMENT OF RECOVERY OF JUDGMENT.—If the complaint avers the recovery of a judgment against one of several defendants, the Court in which it was recovered, and the date and amount of the same, the defendants, in their answer, may deny the same upon information and belief.

[1] PLEADINGS.—When the material facts alleged are presumptively within the knowledge of the defendant, he must traverse them, if he undertakes to do so, or must state how it is that he is without knowledge of such facts.

IDEM.—The recovery of a judgment is not presumptively within the knowledge of the defendants.

Cited, Roussin v. Stewart, 33 Cal. 211; Jones v. Petaluma, 36 Cal. 234; Kirstein v. Madden, 38 Cal. 163; Davanay v. Eggenhoff, 43 Cal. 397. See Butler v. Vassault, 40 Cal. 74.

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EXECUTION IN EVIDENCE.—An execution is not admissible in evidence without first introducing the judgment on which it was issued.

SHERIFF'S DEED AS EVIDENCE.—A Sheriff's deed is not admissible in evidence without first introducing the judgment which was the foundation of the Sheriff's authority to sell.

APPEAL from the District Court, Fourth Judicial District, city and county of San Francisco.

The facts are stated in the opinion of the Court.

Lloyd Baldwin and *J. W. Dwinelle*, for Appellants.

Whatever may have been the result of the equitable issues, the plaintiff could not recover in ejectment, having neglected to give in evidence the judgment upon which his title was founded. In the law branch of the case, the denials of Mrs. Austin, upon information and belief, are equivalent to the general issue, not guilty, in ejectment at common law. (Simmons *v.* Sisson, 26 N. Y. 370.) And when the general issue is pleaded, a party claiming under a Sheriff's deed cannot recover unless he give in evidence the judgment. An execution without a judgment gives the Sheriff no right to intermeddle with property. (Jackson *v.* Hasbrouck, 12 John. 213; Smith *v.* Moreman, 1 Mon. 154.)

The denial of Mrs. Austin, upon "information and belief," puts in issue the validity of the Barker judgment. The complaint alleges the recovery of a certain judgment, the answer denies it upon information and belief, and the Court below holds this form of denial to be an admission. We do [598] not deny *the plaintiff's position, that as to facts within the personal knowledge of a defendant, denials must be positive, and not on information and belief; but when he holds that the fact of judgment or no judgment was, or by any reasonable intendment could be, within the personal knowledge of Mrs. Austin, and therefore she must deny positively, we deny his minor. She had been the legal owner and in possession for nearly seven years, when papers were served upon her claiming that one Vassault had rights in the property. She immediately went to her attorney, gave him the papers, and followed his advice. Nothing more could be required of her. No Court could hold that it was her duty

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to go to the Clerk's office and inspect the rolls, nor could she determine even by such inspection whether a series of documents constituted a valid judgment, without an intimate knowledge of law. Must she then deny positively? I understand the rule to be that those who swear positively to that which they do not positively know, and those who swear to that which they know to be false, commit perjury alike.

In The United States v. Langton, 5 Mason, 280, the Court use the following language:

"The answers are not to be more rigidly or differently construed from what they would be in a bill in Chancery. If the answers are not full, the plaintiff is at liberty to propound closer interrogatories; but he is not to charge parties upon a mere slip or mistake of certainty, or because they do not positively answer, what in conscience they do not positively know. The law would otherwise be a snare, which might entrap them to their ruin and involve them in a double responsibility."

In the text books, which I have particularly examined, the same rule is stated, that defendants must answer positively as to facts within their own knowledge, and the invariable example given is "as where the act was done by himself." (1 Daniell's Ch. Pr. and Pl., Perk. ed., 736; Story's Eq. Pl. sec. 854; 1 Van Santvoord's Pl. 431.) And in the same *connection in each work I find, "but as to facts which [599] have not happened within his own knowledge, he must answer as to his information and belief, and not as to his information merely, without stating any belief, either one way or the other."

This humane system of allowing a defendant to raise an issue without perjury was built upon one of Lord Clarendon's orders, as appears in Paige's Reports hereafter cited. In Hall v. Bodily, afterwards decided, the defendant was charged with having received money as trustee. He answered that he received no more than a certain amount mentioned, "to his remembrance," and it was held to be a good answer. (1 Vern. 470.) In Hall v. Wood, 1 Paige, 407, the Chancellor uses language applicable to the present case: "Compelling a defendant to answer positively is a measure of doubtful policy,

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except with a view to a conviction for perjury," and "a positive answer, to a conscientious man, might appear very much like swearing to what he could not know." Plaintiff's counsel seems to have supposed that certain decisions in this Court sustained his position. In Curtis *v.* Richards, 9 Cal. 33, the answer is held insufficient; but there the denial was that defendants have no knowledge or information sufficient to form a belief," etc. Mr. Justice Field says: "There are but two forms in which a defendant can controvert the allegations of a verified complaint, so as to raise an issue: First, positively, when the facts are within his own personal knowledge; and secondly, upon information and belief, when the facts are not within his own personal knowledge," and he adds: "In no case can an allegation of the complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief." In Humphreys *v.* McCall, 9 Cal. 59, the answer was, "and defendants deny, for want of information to enable them to admit the sale," etc. Mr. Justice Burnett says: "The answer in this case says nothing about the *belief* of the defendants. It does not deny that defendants had any information, but simply avers a want of information to enable them to admit, not believe, the alleged fact. The object of the statute is to sift the conscience of the defendant, and [600] *obtain from him his *belief*. He must answer according to his belief, whether that belief be founded upon sufficient or insufficient information. The word 'belief,' as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant, drawn from information." In the Gas Company *v.* San Francisco, 9 Cal. 453, the principal question was whether a municipal corporation should be held to the same strictness in denials as a natural person, but that decision affords no authority for the ruling in this case, since the language used was, "this defendant has no knowledge or information," etc.

The New York Code allows denials of "any knowledge or information sufficient to form a belief," and the contest was whether that form should be introduced into this State. These cases in the 9 Cal. having established the doctrine that such denial, although good under the New York Code, raised

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no issue under ours, the Bar seem to have settled down upon the principle of those cases; at least, I find no further controversy concerning it in the California Reports, except in Caulfield *v.* Sanders, 17 Cal. 571, where a denial "to the best of defendant's knowledge and belief" seems to have been held good. We now come to a period subsequent to February, 1863, that is, subsequent to the time of filing the answers in this case. In Nelson *v.* Murray, 23 Cal. 338, the syllabus might lead a superficial observer into the error that a denial upon information and belief was insufficient. An examination, however, will show that the syllabus is unsupported by the opinion. Plaintiff avers that the *Board of Supervisors* made a *certain order* establishing a certain road; defendant denies, upon information and belief, that the *Court of Sessions established or opened* a road, etc. The case deserves no further comment. In Brown *v.* Scott, 25 Cal. 189, the Court do nothing more than adopt the principle of Lord Clarendon's order, that "an answer to a matter charged as the defendant's own act must be direct, without saying that it is to his remembrance, or as he believeth, unless the Court, upon exception taken, shall find special cause to dispense with so positive an answer." *Defendant strives to avoid [601] the issue by stating on information and belief that his *promise* was without consideration, because the judgments assigned to him were void, and the Court say: "He certainly is not in a position to object that these judgments were of no value to him, when, as a fact, they were received in payment of a sum due from him on his purchase, equal to the amount they represented." Again, he denies on information and belief that the judgments were ever assigned to him. This is insufficient, because he is speaking of his own act. He then denies in the same form that the Sheriff's sale was on executions issued on certain judgments described in the complaint, although he himself was the purchaser at such sale. These facts clearly explain the language of the Court on page one hundred and ninety-six of the opinion, which is in complete harmony with the authorities cited by appellants herein. In Thompson *v.* Lynch, 29 Cal. 191, the clause of the answer was: "And on information and belief, he avers that no such

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deed or deeds were ever executed." The Court say: "This, we think, puts the existence of those conveyances in issue." Thus it is finally settled that a denial on information and belief may be good.

Edward Tompkins, for Respondent.

It was not necessary to prove the judgment, because it was admitted by the answer. The fact was one which it was easy for Mrs. Austin to ascertain with absolute certainty. The law knows no difference in suitors, and makes no discrimination in the rules it applies to them. (S. F. Gas Co. *v.* San Francisco, 9 Cal. 467.) The "information and belief" might be held to be sufficient, and yet the defects in the answer would not be remedied. The complaint alleges as the statute permits, that "the judgment was duly rendered." If the defendant denies that it was *duly* rendered, then the plaintiff must prove it. The answer is in these words: "Upon *information* and *belief*, she denies the recovery of *the said judgment*, in the *said* Superior Court of the city of San Francisco."

[602] *There are several reasons why this was no denial of the allegations of the complaint. It does not say that it is the judgment described in the complaint that is denied, and it is in no way identified, except as "the said judgment;" "said" in what? It is easy to answer that it of course was intended to refer to the judgment in the complaint. Then it should be so specified, and not be left to construction that might be used to mislead. The next denial is of "the recovery of the said judgment." That does not follow the statute that required her to deny that it was "duly rendeerd" in order to put the plaintiff upon proof. But beyond this, it is not a specific denial of the statements of the complaint. The denial might be true, and yet every substantial allegation of the plaintiff be true also. Denying "the recovery of the said judgment," may mean that there is a trifling mistake in the plaintiff's name, or a penny's error in the amount, or a day in the date, or any other trifling mis-description, and so the object of the law, "to probe the conscience of the defendant," would be entirely defeated. We have not followed through the several cases cited by appellant upon this point,

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for the reason that the cases *that do not apply here* are not those in which we have any present interest. We are content to judge them all by the one cited as finally settling that a denial upon information and belief is good—that of Thompson *v.* Lynch. There is another reason why this answer and the proposed amended answer are alike wholly insufficient. The complaint alleges the rendition of a judgment against the defendant, F. B. Austin, by a Court of competent jurisdiction, and states the character of the judgment, and that plaintiff claims title under it. In such a case, "*if the judgment can be attacked collaterally, the answer must specify the points of its invalidity.*" This is the rule laid down most emphatically in the case of People ex rel. the Pacific R. R. Co. *v.* San Francisco, 27 Cal. 655, where the views urged by the counsel for the relators were to a large extent sustained by the Court. We apprehend that our learned friend, the senior counsel for *appellant, *will have no disposition to question the* [603] *correctness of that decision.*

By the Court, CURREY, C. J.:

The plaintiff brought his action of ejectment against Austin and his wife for a lot of land in San Francisco, with which he united a suit in equity against them and one Mansfield Compton, the object of which was to obtain a decree of the Court declaring certain conveyances investing Mrs. Austin with the title to said land fraudulent and void, and further declaring that she had no interest in the premises as against the plaintiff, and enjoining her perpetually from setting up or claiming any right, title, or interest therein. From the part of the complaint setting forth the facts upon which equitable relief is sought, it appears that in March, 1856, Austin and his wife executed a deed of conveyance of the premises in controversy to Compton, which the plaintiff charges was without consideration, and made to delay, hinder, and defraud creditors. That in June of the same year, Compton, by the direction of F. B. Austin, without any consideration therefor, conveyed the same premises to Mrs. Austin, who, since then, has pretended to claim and hold said premises as her separate property. It further appears from the complaint that on the

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25th of August, 1856, Abner H. Barker recovered a judgment in the Superior Court of the city of San Francisco against the defendant, F. B. Austin, for a sum amounting to nearly three thousand dollars, which remains "unreversed and unsatisfied;" and that on the 26th of November, 1860, an execution was issued on such judgment to the Sheriff of the city and county of San Francisco, who levied upon the property, and afterwards, on the 19th of January, 1861, sold the same to G. W. Ryckman, to whom a certificate of sale was given; and thereafter, on the 6th of December of the same year, a deed was executed and delivered by such Sheriff to said Ryckman, who, on the 24th of February, 1862, conveyed the premises to the plaintiff. The complaint was duly verified.

[604] *Compton was served with the summons and a copy of the complaint, and having failed to answer, his default was entered. Austin and his wife appeared and filed separate answers, duly verified. The only portion of these answers to which it is important to refer is in relation to the traverse of the recovery of the judgment in the Superior Court by Barker against F. B. Austin, as alleged in the complaint. It was the same in both answers. They each denied upon information and belief, "the recovery of the said judgment in the Superior Court of the city of San Francisco; the issue of execution on such judgment as set forth in the said complaint; the sale of said lands upon such execution; the issue of said certificate of the said sale to the said Ryckman; the execution and delivery of the said deed of said lands by the said late Sheriff to the said Ryckman; the conveyance of the said lands by the said Ryckman to the said plaintiff." There is no controversy respecting the sufficiency of the answers as full traverses of the matters of the complaint, except as to the portion of the same above set forth in *hæc verba*.

When the cause came on to be tried, the plaintiff's counsel read the complaint to the Court, and then stated that the defendants' answers respectively admitted all the material allegations of the complaint—that is, the recovery of the judgment, the issue of execution, the Sheriff's sale under the execution, the Sheriff's deed to Ryckman, the conveyance by Ryckman to the plaintiff, the plaintiff's ownership of the

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property, and the ouster of him by the defendants, Austin and wife, and the monthly value of the premises. The answers were then read, and the Judge of the Court intimated that his opinion was in accordance with the position of the plaintiff's counsel, but did not then decide the point. An application was afterward made for leave to amend the answer so as to obviate the objections made on the part of the plaintiff, but was denied, and the trial then proceeded.

The plaintiff offered in evidence an execution upon the judgment therein recited, obtained in said Superior Court in favor of Abner H. Barker, against Franklin B. Austin, with *the Sheriff's return thereon, which was the same exe- [605] cution and return set forth in that behalf in the complaint. To this evidence the defendants objected on the ground that the judgment upon which the same purported to have been issued had not been given in evidence. The Court overruled the objection on the ground that the judgment was admitted by the answers, and received the execution and return in evidence, to which decision the defendants severally excepted. The plaintiff then offered in evidence a deed of the lands in controversy, executed by the Sheriff to Ryckman, bearing date the 6th of December, 1861, which was recorded on the 8th of March, 1862, which deed described the judgment as "a judgment recovered in the late Superior Court of the city of San Francisco on the 25th day of August, A. D. 1856, in favor of Abner H. Barker and against Franklin B. Austin." In connection with this, the defendants admitted that said deed was in all other respects perfect in form and substance, as alleged in that behalf in plaintiff's complaint; but they objected to said deed being read in evidence on the following grounds:

First—That the alleged judgment on which said deed purported to be founded had not been given in evidence.

Second—That said judgment was not sufficiently described in said deed.

The Court overruled the objection and thereupon the deed was received in evidence, to which decision the defendants then and there excepted. The deed from Ryckman to the plaintiff was then given in evidence.

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The parties respectively then submitted to the Court other evidence, which it is not of use to notice; and in conclusion the Court rendered a finding and judgment in the plaintiff's favor. A motion for a new trial was made in due time, which was denied, and then the defendants, Austin and wife, appealed.

The plaintiff united in the same complaint an action at law against the defendants Austin and wife, and a suit in equity against them and the defendant Compton. No objection to this course of proceeding was made by the defendants, [606] and *therefore we are not called upon to decide upon the question of its propriety. The legal title to the land in controversy appearing to be in Mrs. Austin, it was necessary for the plaintiff to appeal to the equitable jurisdiction of the Court to obtain a decree declaring the conveyances made by Austin to Compton, and by Compton to Mrs. Austin, fraudulent and void, in order to disincumber the case of the ostensible title of Mrs. Austin, which, if valid, was superior and paramount. And in order to show that the plaintiff had the right to attack the conveyances through and by which Mrs. Austin acquired the title to the land as fraudulent and void, it was indispensable for him to establish a relation on his part to the true title by means of the judgment against Austin, and the sale and conveyance of the property under and by virtue of such judgment and his own acquisition of the title transferred under and by means of it. Therefore he set forth and alleged in his complaint in equity his title and the means by which Austin, the husband, became divested of it, and how the plaintiff became invested with it. The means set forth consisted of a judgment obtained by Barker against Austin in the Superior Court of the city of San Francisco, and an execution issued thereon under which the property was sold and conveyed to Ryckman, and the conveyance from Ryckman to the plaintiff. The existence of the judgment pleaded, the defendants Austin and wife severally attempted to controvert, but instead of doing so positively, they denied the existence of such a judgment on information and belief. If the issue thus sought to be made was effectual, then there is no doubt the Court erred in the admission of the evidence,

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depending upon the existence in fact of the judgment described in the complaint. Then the question to be decided in the first instance is, whether the denial by the defendants upon information and belief, that Barker recovered the judgment against Austin, was effectual. If it was, then it put in issue the allegation of the complaint, which it was designed to controvert.

The forty-sixth section of the Practice Act provides that, if the complaint be verified, the answer shall contain a specific *denial of each allegation controverted by the [607] defendant, or a denial thereof according to his information and belief. It has been a rule of the Courts to require an answer to a verified complaint to be positive in form, in order to put in issue a material allegation of the complaint, provided the defendant is presumed to possess a knowledge respecting the fact alleged; but, if he is not able to answer positively, in such case he must by a proper statement of facts or circumstances overcome the presumption of knowledge on his part, which being done, his answer on information and belief will be deemed all that the law requires. (Brown *v.* Scott, 25 Cal. 194; Humphreys *v.* McCall, 9 Cal. 59.) The plaintiff's position at the trial, which the Court sustained, necessarily proceeded upon the hypothesis that the defendants, Austin and wife, knew whether or not Barker recovered a judgment against Austin as alleged in the complaint, and that, possessing such knowledge, they were bound to state it in positive terms if they said anything about it. This position would seem to be of more force against the husband than as against the wife, because he was a party to the action in which the judgment was obtained, as alleged by the complaint, while she was not. But it does not follow that because the allegation was that Barker obtained a judgment against Austin, the latter must be presumed to know whether such allegation was true or untrue, because a judgment in form is sometimes obtained without any knowledge of the defendant respecting it. If the defendants did not know that such a judgment had been obtained, or the contrary, it was their duty to make the necessary inquiries, that they might be able to determine whether they could deny in any form the existence of the judgment described in the complaint, or whether

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they must admit it, either in terms or by implication, from their silence. The natural course to be pursued in such a case would be, either to call upon the custodian of the records of the Court in which it was alleged the judgment was recovered, and inquire of him if there was such a judgment, or to employ some person more learned or competent than [608] themselves to make the proper inquiries and *investigations; and whether they might be informed by the one or the other of such persons of the truth of the matter, might make no particular difference. Assuming that they adopted the usual means for acquiring information on the subject, and that they became informed, such information was founded on statements or representations of the person or persons of whom they inquired. Still they were, for aught that appears, without knowledge whether such a judgment was recovered; but being informed that there was no such judgment, and believing the information, they might, predicating their respective answers upon such information and belief, deny that any such judgment was recovered.

It is difficult to define with more exact precision when an answer should be positive in its denials, than to say that when the material facts alleged in the complaint are presumptively within the knowledge of the defendant, he must traverse them, if he undertakes to do so at all, directly and positively, or he must show how it is that he is without knowledge of such facts. In the case under consideration, we are of opinion the presumption did not arise that the defendants knew that a judgment had been recovered by Barker against Austin, or the contrary, and consequently that they might deny the recovery of such a judgment upon information and belief.

We have said nothing, and do not intend that any inference shall be drawn from our silence, respecting the validity or invalidity of the judgment in form which was exhibited to the Court below on the motion for leave to amend the answers. It is not agreed by counsel for the respective parties that such judgment is properly before us for consideration, and the question of the jurisdiction of the Superior Court over the person of the defendant in that case has not been discussed by counsel in the submission of this case, and we deem it proper to

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dispose of the appeal upon the point considered, as such point is the only one now necessary to be decided.

Judgment reversed, and a new trial ordered.

Mr. Justice SANDERSON did not express any opinion.

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*JACOB C. BARR v. W. B. SCHROEDER. [609]

DEED OF TRUST.—It is not necessary that a deed of trust by which the grantor conveys to the grantee, in trust to sell the property and pay a debt of the grantor to a third person out of the proceeds, should be delivered to, or assented to, or executed by the *cestui que trust*, or that there should be a debt due from the grantor to the *cestui que trust*, in order, as between the grantor and grantee, to pass the legal title to the grantee.

IDEM.—The above rule does not impair the right of a creditor of the grantor to question the *bona fides* of the deed.

DEED TO FICTITIOUS PERSON.—A deed to J. C. B., when there is no such person in existence, does not transfer the title of the property to any one.

DELIVERY OF DEED.—The recording of a deed is not evidence of its delivery by the grantor to the grantee, unless the deed comes from the hands of the grantor, or some one claiming through or under him.

IDEM.—Without the delivery of a deed, it is void.

CONFIRMATION.—A confirmation is a contract by which an act that was voidable is made firm and unavoidable.

CONFIRMATION OF VOID DEED.—A deed that was void for want of a delivery, or through mistake in reciting the name of the grantee, cannot be confirmed by a subsequent deed given for that purpose.

INTEREST WHICH MAKES POWER OF ATTORNEY IRREVOCABLE.—The interest which an attorney in fact must have in order to render his power of attorney irrevocable, must be an interest in the property on which the power is to be exercised, and not an interest in the money derived from a sale of the property.

IRREVOCABLE POWER OF ATTORNEY.—A power of attorney may be irrecocable though it is not a power coupled with an interest, as where it is given as security for the payment of money, or is made irrevocable.

POWER OF ATTORNEY NOT IRREVOCABLE.—A power of attorney which makes the attorney an universal agent for the transaction of all ordinary business will not be held irrevocable, unless its terms are so plain as to need no construction.

SURPLUS IN DEED DOES NOT VITIATE IT.—If a second deed recites that it is given to confirm a former one in which mistakes had occurred, and the first deed was void, rendering confirmation impossible, the recitals in the second deed may be regarded as surplus, and it will be sufficient in law to pass the title.

APPEAL from the District Court, Second Judicial District, Tehama county.

Ejectment to recover lots nine, ten, eleven, and twelve, in

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block thirty-one, in the town of Red Bluff, Tehama county. The complaint was in the usual form, and the answer consisted of a general denial, and a clause setting up title in defendant acquired by a purchase of the demanded premises at Sheriff's sale, made under an execution issued on a judgment in favor of F. E. Corcoran and wife, and against J. G. Doll and [610] J. L. *Simpson, rendered after the date of the deeds hereinafter mentioned. It was admitted on the trial that said Doll owned the property on the 13th day of April, 1864. The plaintiff, to sustain the issue on his part, offered in evidence a deed of trust made by said Doll to said Simpson, on the 13th day of April. The following is a copy of such portion of the deed as bears upon the point in dispute:

"This deed made and entered into this thirteenth day of April, A. D. 1864, between J. Granville Doll, party of the first, J. L. Simpson, party of the second part, and Cunningham Hawkins, party of the third part, witnesseth as follows, to wit:

"Whereas the party of the first has borrowed of the party of the third part the sum of fifteen thousand dollars, ($15,000,) and has executed and delivered his promissory note therefor, in the words and figures following, to wit:

" '$15,000. SACRAMENTO, April 13, 1864.

" 'On or before the first day of May, 1866, for value received, I promise to pay to Cunningham Hawkins or bearer, in Red Bluff, of Tehama county, fifteen thousand dollars in gold coin of the United States, of the standard value of 1860, with interest from date until paid, at the rate of two per cent. per month, payable in like gold coin monthly, and should default be made in the payment of said interest, then the same shall be added to the principal and bear the same rate of interest, or the whole amount of principal and interest shall become immediately due and payable at the option of the holder hereof.

" 'J. GRANVILLE DOLL.' "

"And whereas, it is agreed between said parties of the first and third, that the payment of such promissory note and the

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interest that may grow due thereon shall be secured by the said party of the first part conveying to the said party of the second part the property hereinafter described, which the said *party of the second part shall hold, subject [611] to the trusts and conditions hereinafter expressed.

"Article 1st. Now, therefore, the said party of the first part, in consideration of the premises and the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey in trust, as hereinafter expressed, unto the said party of the second part, the following described property. [Here follows a description of the property.]

"2d. And the trusts which the said party of the second part declares are as follows: First, That he will, upon the payment of the said promissory note and the interest, reconvey to the said party of the first part all and singular, or so much thereof as may remain unsold of the hereinbefore described property, and will account for the rents, issues, and profits thereof in the meantime, as well as for the proceeds of sales of property which may be sold by virtue of the power hereinafter conferred. Second, That he will skilfully and prudently control, manage, and take care of all the property by this instrument vested in him, and will, upon the failure of the said party of the first part to pay the interest on said promissory note, as the same becomes due, apply the net proceeds arising from the rent, use, and occupation of said property towards the payment of the same. Third, That he will, upon the demand of the said party of the third part, or the holder of said promissory note, upon the said party of the first part failing for the space of three months to pay the interest thereon, proceed to sell at private or public sale, whichever in his discretion may seem best, so much of said property as he may deem prudent, and for such sums as of money as to him shall seem meet. and apply the proceeds of such sales towards the liquidation of said debts evidenced by said promissory note. Fourth, That his compensation for such services shall be limited to such disbursements as the

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prudent and skilful management and protection of the
[612] *property shall require to be made, and a commission of five per cent. upon the sales of said property made by him, and ten per cent. upon all sums collected by him for rents of the said property. * * *

"J. GRANVILLE DOLL." [L. S.]
"J. L. SIMPSON." [L. S.]

The defendant's attorney objected to the deed being received in evidence, because not signed by Hawkins. The Court reserved its decision upon the point until the further progress of the trial. The plaintiff then introduced in evidence a deed of the property from the trustee Simpson to Edward C. Jones, dated December 17th, 1864. Defendant's attorney objected, because no authority was shown from Hawkins, the *cestui que trust*. The Court still reserved its decision.

The plaintiff, after proving that the Bank of Red Bluff was a corporation, then introduced a power of attorney from said E. C. Jones to said corporation, dated the 20th day of December, 1864, empowering the corporation to sell said property and apply the proceeds to Jones' indebtedness to the bank. This power of attorney contained a power of substitution. In connection with this power, the plaintiff also introduced a substitution of the power from said corporation to J. L. Simpson, dated July 5th, 1865.

The plaintiff then introduced in evidence a certified copy from the Recorder's office of a deed of the property from said Edward C. Jones to John C. Barr, of Clark county, Ohio, dated May 10th, 1865. The loss of the original had been first proved. In this connection, plaintiff proved that Barr's given name was Jacob C. Barr, and that by mistake he was called John C. Barr in the deed.

The plaintiff then introduced in evidence a deed of the property given by said Jones by his attorney in fact, J. L. Simpson, dated the 17th day of March, 1866. This deed from Jones by his attorney to Barr, is the one which recites the former deed of Jones to Barr and the mistake in it,
[613] and that it *was made to correct and confirm the former deed, as stated in the opinion of the Court.

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The defendant, as the testimony was offered, interposed objections, but the Court still reserved its decision. The plaintiff then rested. The defendant, by his attorney, moved for a nonsuit, because the plaintiff had shown no title to the property. The Court granted the motion, and plaintiff excepted. The plaintiff appealed.

The other facts are stated in the opinion of the Court.

J. G. Doll, for Appellant.

The granting defendant's motion for a nonsuit appellant insists was error. The deraignment of the title from Doll by plaintiff to the premises is perfect, and is not subject to any of the objections urged by defendant's counsel. The deed from Doll to Simpson in trust with power of sale did not, in point of law, require the signature of either the party of the *second* or *third* part, any more than an ordinary mortgage or deed of conveyance requires the signature of the grantee or the party secured. Koch *v.* Briggs, 14 Cal. 256, was a case where property was conveyed in trust to secure, and, by the sale, to pay a debt. In that case, like this, there were three parties to the deed, to wit: a grantor, trustee, and a *cestui que trust*, yet only one of the parties (the grantor) signed it. We contend that the delivery of the deed would be implied, and likewise the assent of the *cestui que trust*. (2 Kent, 533, and notes; 4 Kent, 455, 456, and notes; 1 Mead, Tenn. 206; 11 Wheat. 78.) The power of attorney from Jones to the Bank of Red Bluff is irrevocable, because coupled with an interest. It contains full power of substitution. This last power is exercised in the appointment of Simpson. The power, sole, full, and complete, to convey the property is thus found lodged in Simpson. The form or manner in which this power is exercised is important only as between the Bank and Jones. The consideration, if any, moving between the parties who got it and how disposed of, is likewise unimportant and irrelevant to any issue now involved. It would *be diffi- [614] cult to frame a letter of attorney granting more comprehensive and complete powers than the one under consideration, and the deed of Jones, by Simpson, attorney, of March 17th, 1865, would convey the title to plaintiff, whether for the

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purposes of this action it be considered as a grant or a confirmation.

W. S. Long, for Respondent.

In this case the nonsuit was properly granted. The trust deed relied on by the plaintiff was never executed. A contract must be binding upon all the parties to it or is not binding at all. A deed between several parties is not valid as a deed until it has been signed by all the parties. (Doe ex Demise of Lewis *v.* Bingham, 4 Barnwell & Ald. 675; 6 Eng. Com. Law, 650; Sacramento *v.* Dunlap, 14 Cal. 421; People *v.* Hartley, 21 Cal. 588.) If this deed fall, then there is no authority to execute the lease. (Folsom *v.* Perrin, 2 Cal. 604.)

By the Court, RHODES, J.:

The motion for a nonsuit was sustained on two grounds. The first ground is that the deed of trust did not pass the title from Doll. Doll conveyed the property in action, together with other lands, to Simpson in trust, to sell so much thereof as he might deem proper, to pay the promissory note of Doll to Hawkins, upon Doll's failure to pay the same, and on the demand of the holder of the note, etc.; also, to sell parcels of the land "whenever in his opinion a reasonable price was offered for the same;" and to reconvey to Doll the portion remaining unsold, upon the payment of the note to Hawkins. The objections to the deed stated by the Court in granting the nonsuit were, that it was not signed by or assented to by Hawkins nor delivered to him. It was not necessary that it should have been signed by Hawkins. There are no covenants or conditions on his part in the deed requiring that it should be executed by him; and no rule of law is cited [615] which *makes it requisite that the *cestui que trust* should execute the instrument creating the trust. It appears from the testimony of Doll, that the deed was delivered to Hawkins, and, if delivered to him, his assent to it is presumed. But the point need not be rested on that ground. The deed would be good as between Doll and Simpson, without any delivery to or assent by Hawkins, and indeed its sufficiency to pass the title to Simpson does not depend upon the fact of

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there being such a note as is therein described, or even a debt due from Doll to Hawkins. If Doll chooses to convey, and Simpson is willing to take the title, under such circumstances, they may declare such trusts as they please, and both are bound by the recitals and are estopped from denying that the legal title passed. This does not impair the right of a creditor of the grantor to question the *bona fides* of the transaction. The conveyance is valid as between the parties though it should be held fraudulent and void as against the creditors of the grantor, on the ground that it was executed with the intent to hinder, delay, or defraud them. Questions such as might grow out of a contest between a person claiming title through Simpson, and a creditor of Doll, could not properly arise upon the motion for a nonsuit. The deed was *prima facie* sufficient to pass the title, and if the defendant would attack it, on the ground that it was not executed to secure the debt therein mentioned, he must first bring himself into the proper relations with the grantor.

The second ground is, that the title did not pass from Jones to the plaintiff, Jacob C. Barr. Jones executed a deed of the premises to *John C. Barr*, and subsequently Simpson, as the attorney in fact of Jones, executed a deed to *Jacob Barr*, and in it reference is made to the deed of Jones, and it is recited that by mistake Jacob C. Barr was therein called and named *John C. Barr*, and that the parties desire to correct the mistake and confirm the grant in said deed according to the then intention of the parties; and the premises are conveyed by the deed to Jacob C. Barr "as well in performance of the covenants in said indenture contained, as also for and in *consideration of the premises hereinbefore recited, [616] and the further consideration of one dollar to him, the said Edward C. Jones, in hand paid by the said Jacob C. Barr, the receipt whereof is hereby acknowledged." The deed of Jones did not transfer the legal title to the plaintiff, nor did it transfer it to any one. There is no evidence of the delivery of the deed to John C. Barr, nor, in fact, is there any evidence that there was such a person in existence as John C. Barr. Had it been shown directly that there was such a person as John C. Barr, or had the same been made to appear by

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presumption, by the production of the deed by one claiming through him, there would, perhaps, be no difficulty in holding that the recording of the deed was evidence of its delivery; but the recording is not evidence of the delivery of the deed, unless it comes from the hands of the grantee therein named, or some one claiming under or through him. The question therefore turns upon the deed executed by Simpson as the attorney in fact of Jones.

Jones executed to the Bank of Red Bluff a power of attorney, very ample in its terms, giving the Bank authority, among other things, to lease, bargain, sell, re-lease, and convey lands; to execute and deliver deeds; to substitute an attorney in its stead, and to credit all moneys, credits, and effects received by the attorney, or the substitute, upon the note of Jones to the Bank, described in the letter of attorney. The Bank substituted Simpson as the attorney in fact of Jones. The deed executed under this power did not operate by way of confirmation of the deed of Jones, nor is it possible for it to have such an operation. A confirmation is a contract by which an act that was voidable is made firm and unavoidable. It necessarily implies a prior voidable act. A deed is an instrument in writing, sealed and delivered. Without a delivery the writing is not voidable, but it is void—a mere nullity. The execution and delivery of the second instrument—the one executed by Simpson as the attorney in fact of Jones—did not constitute a delivery of the first. It was a misapplication of terms to say that the parties desired to confirm the grant, for one of the parties to the second deed was not a [617] party to the *first; the first deed was not a grant; if it was susceptible of confirmation it would have vested the title in John C. Barr; and it is, to say the least, unusual for an agent to ratify the acts of his principal. If the second deed was of any force, it derived its value from its own execution and delivery.

The same is true of the second deed in respect to the attempt to correct the first. The first deed having omitted the name of the intended grantee, the transmission of the title to the plaintiff must of necessity depend upon the second deed, in which he is described. The matter would be no

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clearer had the mistake been the omission of the premises intended to be conveyed.

Was the second deed sufficient to pass the title of Jones to the plaintiff? It is claimed by the plaintiff that the letter of attorney of Jones to the bank was given for the purpose of securing the payment of his promissory note, that as such it amounted to a "power coupled with an interest," and was therefore irrevocable. This position cannot be maintained. The interest which the party to whom the power is given must have, in order to render the power irrevocable, must be an interest in the property on which the power is to be exercised. It is not enough that the donee of the power is interested in that which is produced by the exercise of the power. If his interest is thus limited, the power and the interest cannot be coupled, for the proceeds do not arise until after the power has been exercised, and when it is exercised, it is extinguished. (Hunt *v.* Rousmaniere, 8 Wheat. 174; Bergen *v.* Bennett, 1 Caine Cas. 1.) No interest in the land was conveyed to the bank at the execution of the power of attorney, or was then held by it. But a power of attorney may be irrevocable, though it is not a "power coupled with an interest." This is often the case where the power of attorney is given as a security for the payment of money. Where the constituent expressly agrees that the power of attorney shall be irrevocable, or the nature of the contract shows that such was the intention of the parties, he will be held to the *contract, and not be permitted to revoke it, either directly or indirectly, except upon the payment of the money intended to be secured. The difficulties in the way of holding this power irrevocable are very great, if not insuperable. As already remarked, it is most comprehensive in its grant of authority to the attorney, constituting him an universal agent. There is scarcely an act that may be performed in the transaction of ordinary business that he has not empowered his attorney to perform in his name. There is no different authority given in respect to this land than is given over all the property and business of the constituent, and if the power of sale in this case should be held irrevocable, it must also be held that the power granted in respect to his en- [618]

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tire property and business was irrevocable, and he would thus be left chargeable with the debt to the bank, but without any power to raise the money for its payment. The terms of the grant must be so plain that there is no room for construction, or it will not be held that such plenary power was intended to be made irrevocable.

But it would not seem to be necessary to claim that the power granted was irrevocable in order to uphold the deed executed by Simpson as Jones' attorney in fact. Strike out of the deed the matters in respect to the mistake, and the confirmation and the deed still remains sufficient in law to pass the title. Those matters must be disregarded, because they were impossible of accomplishment in that mode. The deed is not vitiated by their presence. Had Jones personally executed the second deed as well as the first, there would be no question that the second was sufficient to pass, and that it alone did pass the title to the plaintiff; and as the first deed did not pass the title, and therefore did not revoke or impair the authority of the attorney in fact, the second deed is to be regarded as if executed by the constituent.

Judgment reversed, and the cause remanded for a new trial.

[619] *SAWYER, J., dissenting:

In my judgment there is no legal evidence in the record tending to show that John C. Barr, the grantee nominated in the deed, was not the real as well as the nominal and apparent grantee. The affidavit of Doll was introduced for the purpose of laying the foundation for introducing a copy of the deed from the record. For that purpose it was evidence, but for no other. It was *ex parte* and no evidence to the point as to who was intended to be the real grantee in the deed to John C. Barr. And it does not appear to have been introduced for any such purpose. The recitals in the subsequent deed, executed under the power of attorney, purporting to correct the alleged mistakes, and to which John C. Barr was no party, are no legal evidence of the mistake recited. Doll does not directly testify to any such mistake. There is no evidence that there was not such a man as John C. Barr, and the fact that a deed to him was executed and recorded is, I think, pre-

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sumptive evidence that the deed was delivered for his benefit. Conceding, then, that the mistake alleged may be shown in an action to recover the possession of land, there is not, in my judgment, any evidence in this case to show the fact, and the evidence presumptively shows title in John C. Barr, and not in the plaintiff.

The plaintiff is not entitled to recover on the ground that defendant has attorned to him as his landlord, for the demand shown is insufficient to terminate the tenancy under the terms of the lease. For this reason I think the evidence, as disclosed by the record, does not make a *prima facie* case for plaintiff, and that the nonsuit was properly granted.

Mr. Justice SANDERSON did not express any opinion.

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*JOHN C. AYRES *v.* JOHN BENSLEY, F. DU- [620] MARTHERY, M. COMPTON, FREDERICK MASON, AND THE CITY AND COUNTY OF SAN FRANCISCO.

[1] DEFENCE OF PENDENCY OF ANOTHER ACTION.—The defence of the pendency of another action is not available, unless the causes of action and the plaintiffs, at least, in both actions, are the same.

IDEM.—In an action to quiet plaintiff's title to land, alleged to be clouded by defendants giving out that the title is in themselves and not in plaintiff, an action of ejectment pending, in which the defendant does not ask for affirmative relief, is not available as a defence.

DEFENDANT NEED NOT LITIGATE NEW MATTER.—A defendant in ejectment is bound to bring forward all matter of a strictly defensive character, or be precluded from again litigating the same; but he is not bound to set up or litigate new matter constituting a cause of action in his favor.

[2] POSSESSION OF LAND.—A person who enters into the actual possession of a portion of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure, but acquires possession to all of the land not in the adverse possession of another person at the time of his entry.

PRIOR POSSESSOR OF LAND.—Where the title to land rests in possession only, the prior possessor has the better title.

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[1] Cited, Hills *v.* Sherwood, 48 Cal. 392.

[2] Cited, Walsh *v.* Hill, 38 Cal. 487; Donahue *v.* Gallavan, 43 Cal. 575. Questioned, Cannon *v.* Union Lumber Co., 38 Cal. 676. Modified, Wolfskill *v.* Malajowich, 39 Cal. 280.

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APPEAL from the District Court, Twelfth Judicial District, city and county of San Francisco.

This action was brought to quiet plaintiff's title to a tract of land containing about ten acres, situated on what is known as the "Potrero Nuevo," in the city and county of San Francisco. The defendants, except the city and county of San Francisco, set up in their answers that before the commencement of this action, the defendants, Compton and Bensley, as plaintiffs, commenced an action of ejectment in said Court against the plaintiff, Ayres, and others, to recover possession of the same premises described in the complaint, in which action service was had upon said Ayres, and that he answered, alleging that he was the owner of the land, and that said action was then pending and undetermined. The plaintiff demurred to this part of the answer, and the Court sustained the demurrer.

On the 3d day of June, 1851, George Roberts and John Lange executed and delivered to John Crowell a deed of a tract of land lying on said "Potrero Nuevo," which in-
[621] cluded *within its boundaries the land in dispute. Crowell pointed out to Roberts and Lange the boundaries of the tract conveyed, which were indicated by small ditches and stones placed at intervals along its eastern and western lines. Roberts and Lange were not in the actual possession of any part of the land, nor had they ever made any improvements on the same. The deed described the boundaries.

On the 2d day of August, 1853, Crowell erected a small house on the land, moved into the house, and caused the western boundary to be more clearly marked by a ditch and pile of stones. Crowell resided on the land untill 1855. During this time he sold and conveyed divers portions of it to different persons, who entered upon their respective purchases. In April or May, 1854, R. B. Stratton erected a house on the ten acre tract in controversy, and on the 18th day of August of the same year the plaintiff Ayres moved into this house, where he was living when this action was tried in the Court below. Between the fall of 1854 and June, 1855, Ayres erected a sub-

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stantial fence around the ten acre tract in dispute, which he had maintained up to the time of trial. Whatever title Crowell had to this tract, Ayres had acquired.

In the fall of 1851, L. H. Wire made a brickyard between a quarter and a half mile westerly from the western boundary of the Crowell tract, and erected buildings thereon, which were used by him for boarding his hands, etc. About five acres of land were connected with the brickyard, none of which lay within the boundaries of the Crowell tract. In June, 1852, Wire sold to Hatch, who a few days thereafter sold to Farrington & Ludlum. In August, 1852, Farrington, who was a citizen of the United States, located one hundred and sixty acres, under the act of April 22d, 1852, entitled "An Act prescribing the mode of maintaining and defending possessory actions on public lands in this State." This claim of Farrington included the brickyard premises and the Crowell tract, and at the time it was made no person was living on the same, except those connected with the brickyard, nor had any improvements been made on it, except such as were *connected with the brickyard, and the slight [622] ditches on parts of the boundary line of the Crowell tract. November 4th, 1852, Farrington & Ludlum conveyed to Bellows and Webster an undivided half of the Farrington claim, and they entered into immediate possession. The title of Webster and Bellows, and Farrington & Ludlum, had vested in defendants Bensley and Compton by sundry mesne conveyances.

In August, 1853, Farrington, Webster, and others, constructed a fence, consisting of light posts with a rail fastened on the top of the posts, around the Farrington claim. This fence was soon torn down in places, and disappeared in the early part of 1854.

On the 20th day of December, 1853, Mason, Bensley, Webster, and others, who then owned the "Farrington claim" and were living on the same, commenced, and before February, 1854, had completed, a substantial fence around the same. Some of the persons within this inclosure claimed under the "Crowell title," and some under the "Farrington title," and the fence was occasionally broken down in places, but had

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been kept up by the parties who built it as well as they could, owing to the contention of contending claimants, up to the time of trial.

The Court below gave judgment that the title of the defendants, Bensley, Compton, Dumarthery, and Mason, was invalid and void, and enjoined them from asserting any claim, right, or title to the land. The bill was dismissed as to the city and county of San Francisco. The defendants against whom judgment was rendered appealed.

The other facts are stated in the opinion of the Court.

J. McM. Shafter, for Appellants.

The Court erred in sustaining the demurrer. The fact that the possession is in Ayres is alleged and admitted by both sides. The *title* and *consequent right of possession* are distinctly and solely put in issue in both actions in precisely equivalent terms. The *judgments* prayed are equivalent. In the [623] *ejectment Ayres prays to defeat Bensley and Compton's action, so that his possession, based upon his title, shall be ratified by the judgment. In this action he prays that "he be quieted in the possession and enjoyment of said premises" by the judgment. His further prayer, as to declaring his title paramount to ours, etc, is only to have the *Court* affirmatively express what the law would declare the effect of the judgment, without such direct judicial explanation. A man who should defend an action upon a promissory note (of which he had obtained possession) on the ground that it was a forgery, would probably be satisfied that after judgment in his favor upon that issue, that he was quite safe from another action, and would hardly suppose that it was necessary to commence a new suit to procure a decree in equity cancelling the note for the reason that it was spurious. The precise identity need not be made out. It is sufficient if the same object may be obtained in the first suit which is sought in the second. "It seems to me not necessary or proper to be going on with two suits *pari passu*, when one is capable of accomplishing the whole object." (Per V. Chan.) (Dickinson *v.* Codwise, 4 Ed. Ch. 341; Estrada *v.* Murphy, 19 Cal. 248; Weber *v.* Marshall, 19 Cal. 447; Morris *v.* Rexford, 18 N. Y. 552;

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Swart *v.* Borst, 17 How. Pr. 69; Dobson *v.* Pearce, 12 N. Y. 156; N. Y. Cent. Ins. Co. *v.* National P. Ins. Co., 14 N. Y. 85; Crary *v.* Goodman, 12 N. Y. 2; Winfield *v.* Bacon, 24 Barb. 154; Foote *v.* Sprague, 12 How. Pr. 355; Phillips *v.* Gorman, 17 N. Y. 270.)

That Ayres *could* avail himself of his title in the action of ejectment, with which to defend his possession, and that if he desired he might have brought forward any equities he had, and demand any affirmative relief to which he deemed himself entitled, is certainly undeniable; and that he ought to have so brought them forward, under penalty of sacrificing such right, we think is equally true. (2 Cow. & Hill's Notes, 4th ed., p. 21, note 262.) That Ayres *must have* availed himself of his title in the action of ejectment, or have sacrificed the right to do so, in an action like the present, is evident *from the further consideration, that if he withheld the [624] defence and was put out under the judgment therein, *not being thereafter in possession*, he could no longer maintain this action. (Pr. Act, sec. 254.)

Take the foregoing considerations in connection with the reasoning of this Court in Caperton *v.* Schmidt, 26 Cal. 469, there can be no doubt remaining that the ejectment pending is an entire defence to this action. If Farrington's claim under the Possessory Act is not good, Webster and Bellows had a common law possession when they bought in November, 1852. Their possession extended to the boundaries of the land described in their deed. This was prior to the entry of Crowell, under whom plaintiff claims. (Hicks *v.* Coleman, 25 Cal. 122; Phelps *v.* Sawyer, 2 Aik., Vt., 150; Beach *v.* Sutton, 5 Vt. 209; Brown *v.* Edson, 22 Vt. 357; Clarke *v.* Courtney, 5 Pet. 320, 355; Hickie *v.* Starke, 1 Pet. 98.)

M. Compton, also for Appellants.

The District Court erred in sustaining the demurrer to the *second* and *fourth* defences, contained in the answer of the defendant Compton. The question is, whether, when a Court of competent jurisdiction once acquires cognizance over a cause and the subject-matter, it can be divested of that jurisdiction by another Court of concurrent jurisdiction? It is

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no answer to say that this is an equity action. Why not try the question of title or possession as well at law as in equity? We say that the action of ejectment is a bar to this present suit. (Caperton *v.* Schmidt, 26 Cal. 469.) The question is who has the best title to the premises in question. The presumption of title is always on the side of the first possessor. (Potter *v.* Knowles, 5 Cal. 88.) And when neither party connects himself with Government, the title is considered in the first possessor. The possession must be actual and not constructive. (Mott *v.* Smith, 16 Cal. 533.) As to what is actual possession as distinguished from constructive possession, see Minturn *v.* Barr, 16 Cal. 109; Mott *v.* Smith, 16 [625] *Cal. 533; Lawrence *v.* Fulton, 19 Cal. 653; Havens *v.* Dale, 18 Cal. 359; Hutton *v.* Schumaker, 21 Cal. 453; Humphreys *v.* McCall, 3 Cal. 64; Gird *v.* Ray, 17 Cal. 352. John Crowell had no such possession prior to his going on the land, August 3d, 1853, as gave him a right to the land as against Farrington, claiming under the preëmption laws. The going on waste and uninclosed land by Roberts and Lange, and marking out boundaries by ditches without even occupying it or inclosing it, and Crowell's subsequently building a house and occupying it, gave neither Roberts and Lange, or Crowell, any claim or possession as against Farrington and his grantees, so as to prevent them from taking possession and inclosing it with a view of claiming it under the preëmption laws. (Mott *v.* Smith, 16 Cal. 533.) Whatever might have been the intentions of Roberts and Lange at the time of their survey, their rights were lost by not inclosing or residing upon the land. (Gird *v.* Ray, 17 Cal. 352.)

J. B. Crockett, for Respondent.

In ejectment the plaintiff may recover upon his title to either an absolute or qualified estate, which entitles him to the possession, or upon prior possession alone against a mere intruder. The defendant may defeat the action if the plaintiff claims under a paper title, by showing a better title in himself or a stranger; or, if the title be founded on possession alone, by showing a prior possession. The action *may* try the title, or it may involve only the present right of possession. In

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either case, the complaint under our system contains substantially the same allegations, to wit: that the plaintiff is entitled to the possession, and that the defendant wrongfully withholds it from him. The answer may either simply deny the plaintiff's right to the possession, or it may aver that the defendant has the better title or the superior right to the possession. It is not necessary or proper for either plaintiff or defendant to deraign his title in the pleadings. At common law, the best *legal* title prevailed in the action, and equitable *titles were not considered. But under our system, [626] though the plaintiff has the legal title, the defendant may defeat the action, if he can show the better equity. If, however, he relies on an equitable defence, he must set it up specifically in his answer, and this is tried by the *Court*. But though he has a valid equitable defence, and *may* set it up in his answer, he is not bound to do so. If he omits to do it, and the plaintiff prevails in the ejectment, the defendant is not precluded from asserting his equity in a separate action. This is not only reasonable, but is plainly the law as expounded by this Court. (Arguello *v.* Edinger, 10 Cal. 157; Weber *v.* Marshall, 19 Cal. 457; Blum *v.* Robertson, 24 Cal. 141.) The point is expressly ruled in Lorraine *v.* Long, 6 Cal. 452. From this brief outline of the action of ejectment as it exists under our system, it is obvious that it has wholly different functions from those which pertain to an action to quiet title. In the former, the *title* is not necessarily involved; in the latter, the title only is in issue. One is a common law action to be tried by a jury, and the other is an equitable action to be tried by the Court. In the one, the judgment is for a restitution of the possession only; and in the other, the judgment for the plaintiff is that he has the better *title*, and the defendant is enjoined from asserting title in the future. In ejectment, unless the defendant sets up in his answer an *equitable* title, he can demand no affirmative relief. If the judgment be in his favor, he will have nothing of record to show that his *title* has been adjudged to be superior to the plaintiff's. On the other hand, in an action to quiet title, the ends to be accomplished are not only to have a direct adjudication on the title, but to place the decree of record in an en-

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during form, so as to remove all cloud from the title. The demurrer was properly sustained for another reason.

The action, the pendency of which was pleaded, was not between the same parties. Farrington and Ludlum, when they first entered, claimed only the *brickyard*, under their purchase from Wire. *They never had a conveyance from any one for any other portion of the one hundred and sixty acres.* In [627] *the spring of 1853 they built the house near the centre of the tract; but there was no inclosure around it, nor upon any part of the tract, except, perhaps, a few acres about the brickyard. These acts constituted no possession of any part of the tract, except the brickyard and the ground covered by the house. The next act was the building of the skeleton fence in August, 1853. This constituted no possession of any portion of the one hundred and sixty acres, because the fence was not of a character to turn cattle, or establish their dominion over the land, and particularly over the premises in controversy; because before the fence was built Crowell had entered under the deed from Roberts and Lange, and had erected his house, and was actually residing on the land, claiming title to the boundaries specified in his deed. Nor did the fence of 1854 establish the possession in the defendants as against Crowell and his vendees, or indeed, as against any one; because this fence included Crowell and others who were then in the actual adverse possession. If we lay aside entirely the deed from Roberts and Lange to Crowell, the findings of the referee establish that in 1851 Wire was in possession of the *brickyard* only; that Farrington and Ludlum succeeded to this possession; that in 1852, Farrington, for the joint benefit of himself, Ludlum, and Bellows, caused a survey to be made of one hundred and sixty acres, including the brickyard, placed a few small stakes at long intervals to indicate the boundaries, and made a futile effort to take up the land under the Possessory Act of 1852; that early in 1853 they erected a house about the centre of the tract; that whilst things were in this condition Crowell entered on the extreme eastern end of the tract, remote from the brickyard and from the house of Farrington, and erected his shanty, claiming to be the owner of all that portion of the tract included within

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certain ditches, stakes, and piles of stones; that he sold and conveyed a portion of his claim to Brewster, who also entered; after which, without their consent, Bensley and Mason, the successors to Ludlum and Farrington, erected a substantial fence, including the entire one hundred and sixty acres.

*These being the facts, I inquire what *right* had Bens- [628] ley and Mason to the land claimed by Crowell, and on which he resided, and by what authority did they assume to include Crowell in their inclosure?

By the Court, SANDERSON, J.:

The demurrers to the defendants' answers, so far as they allege the pendency of another action between the same parties for the same cause, were properly sustained. In order to render that defence available, it must appear that the causes of action and the parties (the plaintiffs at least) are the same in both actions; neither of which, in our judgment, can be affirmed of the present case, and of this a bare statement of the facts upon which the question is presented, would seem to be conclusive. This action is brought by Ayres alone against Bensley, Dumarthery, Compton, Mason, and the City and County of San Francisco, under the two hundred and fifty-fourth section of the Practice Act, to quiet title to a certain tract of land described in the complaint, of which the plaintiff alleges himself to be in possession. The wrong and injury of which the plaintiff complains, is that the defendants have falsely pretended and given out in speeches that he (the plaintiff) has no valid title thereto, and that the legal title is in themselves, and that they are entitled to the possession thereof, and that thereby they have cast a cloud upon his title and caused many persons to believe it to be worthless, and thereby greatly impaired its market value. The relief which he seeks is a decree adjudging his title to be superior and paramount to the pretended titles of the defendants, and that he may be quieted in the possession of said land and the defendants enjoined from asserting any title to the same hereafter.

The action pleaded in abatement is an action of ejectment brought by the defendants Bensley and Compton against the

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plaintiff Ayres, and divers other persons not named, for the possession of the land in question. The wrong com-
[629] plained of *is that Ayres and his co-defendants "unlawfully and wrongfully, with force and arms, entered into and upon said premises, and ousted and ejected the plaintiffs therefrom." The relief asked is a judgment awarding to the plaintiffs the possession of the land. In his answer, Ayres denied the averments of the complaint, and alleged title in himself, but asked no affirmative relief.

That these causes of action are essentially different would seem to be obvious upon bare inspection. The wrongs complained of and the redress sought are in no respect alike. The *gravamen* of the latter is a wrongful entry and ouster; that of the former is a slander of plaintiffs' title. Testimony in support of one would not support the other, except so far as title might become the subject of inquiry in the ejectment suit which might or might not occur. Moreover, the objects of the two actions are entirely different, notwithstanding the main point in dispute may be the same: one attainable in a court of law, and the other in a court of equity.

These obvious distinctions between the two cases do not seem to be denied by counsel for appellants; but it is claimed that Ayres could have obtained in the first suit all that he seeks in this, under our system of practice, and that he ought therefore to have brought forward in his answer in that case the matters contained in his complaint in this, under penalty of sacrificing all his rights in the premises. Conceding that he might have adopted that course, yet he did not, and we know of no rule of law making it obligatory. Doubtless he was bound to bring forward all matters of a strictly defensive character which then existed in his favor, or be thereafter precluded; but this cannot be affirmed of other matters constituting a cause of action in his favor. Although under our system a defendant may set out new matter in his answer constituting a counterclaim, and may have any affirmative relief to which he may be entitled, (Pr. Act, secs. 46 and 199,) it does not follow therefrom that he is compelled to do so. Such a rule might become most mischievous in its results, for he might be wholly unprepared to make out his case for the

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*want of testimony which at another time might be at [630] his command. But it is a sufficient answer to this point to say that although the statute provides that a defendant may set out a cause of action in his favor and obtain affirmative relief, it nowhere provides that he shall do it, under penalty of a forfeiture of his claim, and he may therefore do it or not at his option.

But if this objection could be overcome, a conclusive reply to the defence in question is found in the fact that the parties are not only not the same, but they do not, so far as they are the same, stand in the same relation to each other. The plaintiff in this suit is a defendant in the other, and *vice versa*. The foundation upon which the defence in question rests is the abhorrence which the law entertains for a multiplicity of actions. The law does not permit a party to prosecute two actions for the same cause at the same time, because the second suit is not only unnecessary, so far as the enforcement of his rights are concerned, but annoys and harasses the defendant without cause. (Bac. Ab.—Abatement—note *m*.) The reason of this rule, however, can have no application except where the plaintiff in both actions is the same person, hence the rule itself can have no application where such is not the case. The defence of a prior *lis pendens* applies exclusively to the case where the plaintiff in both suits is the same person and both are commenced by himself, and not to cases where there are cross suits by a plaintiff in one suit who is defendant in the other, (Certain Logs of Mahogany, 2 Sum. 593; Wadleigh *v.* Veazie, 3 Sum. 165; O'Connor *v.* Blake, 29 Cal. 312,) which is an obvious deduction from the reason upon which such a defence is founded. Where there are merely cross suits between parties, it cannot, in any just sense, be said that either is prosecuting two actions against the other within the rule in question.

Under the view which we take of this case upon the merits, there are certain points which have been elaborately argued, by counsel upon both sides, which we deem it unne- *cessary to discuss. Upon the points made against [631] the deed of the 3d of June, 1851, from Roberts and Lange to Crowell, we shall express no opinion; nor shall we

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express any opinion as to the possessory right or title of the defendants, so far as it may depend upon the steps taken by Farrington, in August, 1852, to secure a possessory right to what is called the "Farrington Claim," under the provisions of the act of the Legislature of the 22d of April, 1852, entitled "An Act prescribing the mode of maintaining and defending possessory actions on public lands in this State;" nor so far as they may depend upon the erection of the "skeleton fence," in August, 1853, or the "substantial fence," erected in January, 1854. But for the purposes of our decision, we shall assume that the deed from Roberts and Lange to Crowell embraced the land in controversy, and that the defendants acquired no rights under the statute in question, or the "skeleton fence" of 1853, or the "substantial fence" of 1854. Of this summary mode of disposing of all these questions, the plaintiff (against whose title we decide) cannot complain, for upon all of them we assume his position as the correct one.

Thus stripped, the case is reduced to a simple question of prior possession at common law, under color of title, where there is no inclosure; and the law of that question was elaborately considered in the case of Hicks *v.* Coleman, 25 Cal. 122, and we do not propose to go over the ground again. In that case we held that a party who enters into the actual possession of a portion of a tract of land, claiming the whole, under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure, but acquires possession to the entire tract, if it was not in the adverse possession of any other person at the time of his entry; and that such person, in an action to recover possession of the land, will prevail against one who enters subsequently upon the uninclosed part, showing color of title only. All we have to do is to apply the principles of that case to the facts of this.

It appears from the finding that Crowell was the first [632] person, *under whom the plaintiff claims, in the actual possession of any part of the land. He entered on or about the 2d day of August, 1853, under a deed from Roberts and Lange, with specific boundaries, including the land in

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question. The 2d day of August, 1853, then, is to be taken as the date from which the plaintiff's possession commenced.

On the 4th day of November, 1852, no one being in the adverse possession of the land in controversy, Bellows and Webster entered into the possession of what is called the "Farrington Claim," which also includes the land in controversy, under a deed to an undivided half thereof from Farrington and Ludlum, and a lease to the other half from the same parties, and they or their grantees, terminating in the defendants, have been in possession, except when they have been interrupted, until the present time. The 4th day of November, 1852, then, is to be taken as the date at which the defendants' possession commenced. Thus it appears that the prior possession is in the defendants, and hence, under the rule in Hicks *v.* Coleman, their title is superior to that of the plaintiff and must prevail.

Upon the facts as found, the conclusions of law should have been in favor of the defendants. The judgment, therefore, is reversed, and the Court below directed to enter a judgment in their favor.

Mr. Chief Justice CURREY did not express any opinion.

Mr. Justice SHAFTER, having been of counsel, did not participate in the decision.

AYRES *v.* BENSLEY et als.

REHEARING.—An equal division of the Justices of the Supreme Court upon the question of granting a rehearing is a denial of the rehearing asked for.

THIS case is reported *ante* 620.

The facts are stated in the opinion of the Court.

*By the Court, SANDERSON, J.: [633]

A judgment was rendered by us in this case at the January term, 1866, reversing the judgment of the Court below, and directing a judgment to be entered in favor of the defend-

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ants. Within fifteen days thereafter, the plaintiffs moved for a rehearing under the twenty-second Rule. This motion has never been decided, because one member of the Court is disqualified and the others are equally divided in opinion. The defendants now move for an order denying the motion for a rehearing, and directing that a remittitur be issued.

It sometimes happens that the Judges composing a Court are equally divided in opinion. Where such is the case, if the question be upon the reversal or affirmance of the judgment on appeal or writ of error, the judgment must be affirmed. (The case of the Antelope, 10 Wheat. 66; Etting *v.* Bank of the United States, 11 Wheat. 59.) If the division occurs on a motion in arrest of judgment, a judgment must be entered on the verdict. (United States *v.* Worrall, 2 Dall. 384–8.) If on a motion for a new trial, the motion must be denied. (United States *v.* Daniels, 6 Wheat. 542; Cahill *v.* Binn, 6 Binn. 99.) If on the admission of testimony, the testimony must be rejected.

The rule seems to be that where the motion is such as to make an affirmative decision indispensable to the further progress of the action, the action must stop in case of an equal division; but where the motion is in arrest of the progress of the action, an equal division is equivalent to a denial of the motion, and the case proceeds as if the motion had not been made. (Goddard *v.* Coffin, Davies, 381.)

Let the petition for a rehearing be denied and a remittitur issue.

Neither Mr. Chief Justice CURREY nor Mr. Justice SHAFTER expressed any opinion.

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[634] *PROVIDENCE TOOL COMPANY *v.* W. A. PRADER.

BILL OF PARTICULARS.—If a bill of particulars is too general, the party receiving it should obtain an order for further particulars of the account. If he does not, he cannot proceed as if no bill of particulars was rendered.

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[1] ENTRY OF DEFAULT BY CLERK.—The Clerk derives all his power in entering a default, without an order of Court, from the statute, and when he enters a default it must appear that all the facts existed which the law requires to authorize it.

IDEM.—When the defendant demands a bill of particulars, and obtains an order for leave to answer within ten days after the bill is served, and a bill is served which does not contain the items of account, the Clerk may enter a default and judgment if the defendant fails to answer within the ten days.

APPEAL from the District Court, Sixth Judicial District, Sacramento county.

The following is a copy of the bill of particulars furnished by the plaintiff:

"FEBRUARY 23, 1864.

"Mr. W. A. PRADER,

"To PROVIDENCE TOOL CO.

"For mdse. as per bill.....$877 94

"GEO. CADWALADER,
"Attorney for Plaintiff."

"Indorsed: Service of a copy hereof admitted this 26th day of June, 1866.

"R. C. CLARK,
"By H. MCCREARY."

The other facts are stated in the opinion of the Court.

George Cadwalader and *J. G. McCullough*, for Appellant.

R. C. Clark, for Respondent.

By the Court, CURREY, C. J.:

The plaintiff, a corporation, sued the defendant for the price of goods, wares, and merchandise sold and delivered to him, with interest thereon from a date specified. The summons, with a certified copy of the complaint, was served upon the *defendant in the county in which the action [635] was commenced, on the 14th of June, 1866. On the 22d of that month the defendant appeared by attorney and demanded of the plaintiff's attorney a copy of the account on

[1] Approved, Graydon *v.* Thomas, 3 Or. 251.

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which the action was brought, and on the day following procured from the Judge of the Court an order granting him ten days after a copy of the account should be furnished, in which to answer. On the 26th of the same month the plaintiff's attorney served on the attorney for the defendant a bill of particulars entirely general in its character. No answer having been filed, on the application of the plaintiff's attorney the default of the defendant was entered on the 7th of July, and judgment final was thereupon entered against him for the amount demanded in the complaint and costs of suit. A motion was thereafter made on the part of the defendant to vacate the judgment final, and also the default entered. The motion was heard upon the judgment roll and the papers on file in the cause and on affidavits made on behalf of the respective parties. The Court made an order granting the motion, and the plaintiff appealed.

The plaintiff's counsel has assigned as ground of error, on which he claims the order should be reversed, "that the judgment entered by the Clerk was valid and the order setting it aside was erroneous."

It was not objected by the defendant that the action was of a kind in which a default and thereupon a final judgment could not be entered by the Clerk under the conditions of the one hundred and fiftieth section of the Practice Act, if the conditions specified existed; but the reason assigned by the Court for its decision was that the Clerk's action in the premises was without authority and void, because it was necessary for him to determine judicially: First—Whether the paper purporting to be a bill of particulars was such in fact; second—When the same was served; and third—Whether it was duly served. The Court held the case of Wilson *v.* Cleaveland, 30 Cal. 198, to be decisive of the question, in which this Court said that the Clerk in entering defaults exercises [636] no judicial *functions, but acts merely in a ministerial capacity. The same language was used by the Court in Kelly *v.* Van Austin, 17 Cal. 565. It is sometimes difficult to determine whether an act is judicial or ministerial. Judging and thereupon determining in a particular way is, in a general sense, the exercise of a faculty that is of a judicial

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quality; and in the largest sense of the term, all determinations which are the result of judgment are judicial. But the term, when applied to proceedings pertaining to a Court of justice, is limited within a less extended scope, and those acts are denominated judicial which properly pertain to the Judge alone in the exercise of his office. If the defendant fails to answer within the time required by the statute, or such further time as may have been granted, in the cases specified in the first subdivision of the one hundred and fiftieth section of the Practice Act, the Clerk, upon the application of the plaintiff, is required to enter the defendant's default and thereupon enter judgment against him for the amount specified in the summons. In such cases, the Clerk must ascertain from the complaint that the action is of the kind mentioned in the first subdivision of said section; and further, he must ascertain when and where the summons was served, and whether the defendant be in default. The law has imposed on the Clerk the authority to determine these matters, as the necessity of a determination of them is a condition precedent to the exercise of the power to enter the default, and thereupon a judgment final for the amount demanded. These acts of the Clerk, performed in cases falling within the letter and spirit of the statute, have generally been denominated ministerial, as contradistinguished from acts judicial in their nature. (Wallace *v.* Eldredge, 27 Cal. 497; Glidden *v.* Packard, 28 Cal. 651; Bond *v.* Pacheco, 30 Cal. 533.) The Clerk derives all his powers from the statute, and as they are special, no intendments are to be made in support of his act, but in each case it must appear that what he did was within the authority conferred upon him by the statute; and whether the act done by him be considered as purely ministerial or of a mixed nature, partaking of elements both ministerial and *judicial, is of [637] no practical importance. The question is, had he authority to enter the defendant's default and thereupon judgment final against him as the case stood at the time The Judge had granted an order enlarging the time within which the defendant was required by the statute to answer. The running of the extended time was made dependent upon another fact, namely—the furnishing to the defendant by the

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plaintiff a copy of the account on which the action was brought.

The account was furnished on the 26th of June, and on the 7th of July the default and judgment were entered. If the defendant was completely in default on that day, there can be no doubt of the correctness of the action of the Clerk, because the case was one authorizing such action in the event named. Then, was the defendant in default on the 7th of July? We are of the opinion he was. The demand for the account or bill of particulars was made on the 22d of June, and it was furnished four days thereafter. It was, as before observed, most general in form, but it is not pretended that any objection to it was made on that account or any other, until the motion to set aside the default was made; nor that any further account was ordered by the Judge. The fifty-sixth section of the Practice Act reads as follows: "It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party, within five days after a demand thereof, in writing, a copy of the account, or be precluded from giving evidence thereof. The Court or Judge thereof, or a County Judge, may order a further account when the one delivered is too general, or is defective in any particular." If the defendant was not satisfied with the bill of particulars furnished, his course, by the settled practice in such cases, was to apply to the Court or Judge for an order for a further account. (Dennison *v.* Smith, 1 Cal. 437; McKinney *v.* McKinney, 12 How. Pr. R. 24.) The bill of particulars rendered in compliance with the defendant's demand was "for merchandise, as per bill, $877 94." This was as general as the complaint itself, unless the words "as per bill" might be regarded [638] as a reference to an account *before then rendered to the defendant. If the reference made could be considered as to a bill of the particulars of the demand for which action was brought, before then furnished, the defendant could not justly complain that he was not informed for what in particular he was sued, for the object to be secured by requiring of the plaintiff a copy of the account is to apprise the defendant of the particular nature of the demand made,

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and what will be attempted to be proved against him at the trial. (Brown v. Williams, 4 Wend. 368; Smith v. Hicks, 5 Wend. 51; Brown v. Hodgson, 4 Taunt. 189; Gr. Pr. 515.) In Goodrich v. James, 1 Wend. 289, the bill of particulars, instead of setting forth the items of merchandise sold, referred generally to "an account rendered." It being objected to, the Court held it sufficiently definite, saying: "It is allowable when an account has already been delivered, to refer to it generally in the bill of particulars, without relating the items of it. (Peake's Cases, 172.) Besides, the party, if dissatisfied, should have obtained an order for further particulars, and had no right to consider the plaintiff in default, because he had furnished what he deemed an insufficient bill." This authority is in consonance with the settled practice referred to, imposing upon the party dissatisfied with the bill of particulars rendered the duty of applying to the Court or Judge for an order for a further account. A paper purporting to be a bill of particulars in itself and by reference to an account indicated by the words "for merchandise as per bill," having been served more than ten days before the application to enter the defendant's default was made, and the evidence thereof and the order of the Judge enlarging the time to answer being on file, the duty of the Clerk was to ascertain, from the evidence of record in the case, whether the defendant was in default, and upon ascertaining that he was, it was further his duty to enter his default, and immediately thereafter to enter judgment for the amount demanded.

The order appealed from must be and is hereby reversed.

Mr. Justice RHODES did not express any opinion.

615

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[639] *JOSEPH LOVE v. SIERRA NEVADA LAKE WATER AND MINING COMPANY, WILLIAM GEORGE, JOHN BATES, CHARLES BATES, A. HOMPHREY, ADMINISTRATOR OF THE ESTATE OF P. HOMPHREY, DECEASED, JOHN RIDGWAY, FRANCIS WEDGWOOD, HENSLEIGH WEDGWOOD, AND CHARLES ROBE.

SURPLUS AVERMENT IN COMPLAINT.—If the complaint in a foreclosure suit avers that the mortgage was executed by the defendant, (thereby making it by averment a legal mortgage,) and also sets out a copy of the same, and it appears on its face not to be a legal as distinguished from an equitable mortgage, the averment may be rejected as surplusage.

ALLEGATION IN COMPLAINT AS TO CONTRACT SET OUT.—When the plaintiff sets out in his complaint the contract sued on in the terms in which it is written, and then puts a false construction on its terms, the allegation repugnant to its terms should be regarded as surplusage.

RELIEF GRANTED WHEN MORTGAGE IS SET OUT IN COMPLAINT.—If the complaint avers that the mortgage sought to be foreclosed was made by defendant, and contains a copy of it, and also avers facts making it an equitable mortgage, and it appears to be in fact an equitable mortgage, the plaintiff is entitled to have it enforced as such.

STATEMENT MUST SPECIFY HOW EVIDENCE IS INSUFFICIENT.—If the statement on motion for a new trial does not specify the particulars in which the evidence is alleged to be insufficient, the appellate Court will assume the facts admitted in the pleadings as well as those found.

MORTGAGE OF CORPORATION.—A mortgage purporting to be the mortgage of a corporation, but signed by its trustees individually, and not by the corporation by its trustees, is not the legal mortgage of the corporation.

IDEM.—Though such mortgage does not bind the corporation as a legal mortgage, yet it does not follow that it may not be enforced in equity.

[1] WHEN MORTGAGE MADE BY AGENT WILL BE ENFORCED IN EQUITY.—A mortgage on real estate, made by an agent for his principal, though inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority and the failure to execute in the name of the principal resulted from accident or mistake, and will be enforced against the principal and subsequent lien creditors, and also against subsequent purchasers with notice.

IDEM.—Such mortgage does not require reformation, but is ripe for enforcement according to the methods peculiar to Courts of equity.

IDEM.—It is of no equitable moment whether the mistake in the execution of such mortgage was one of law or one of fact.

CONTRACT FOR MORTGAGE NEED NOT BE UNDER SEAL.—A contract for a mortgage need not be under seal, and when made through an attorney in fact his authority need not be evidenced by an instrument under seal, nor is it indispensable that such contract should be executed in the name of the principal.

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[1] Cited, Gerdes v. Moody.

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*APPEAL from the District Court, Tenth Judicial Dis- [640]
trict, Sierra county.

The following are the material allegations of the complaint in this case:

Joseph Love, the plaintiff in the above entitled action, and a resident of England, by his attorneys, Van Clief & Gear, shows to this honorable Court that on the 29th day of July, 1858, the Sierra Nevada Lake Water and Mining Company—which was then and still is a corporation duly organized under and by virtue of the laws of the State of California, whose principal place of business is at Forest City, in the county of Sierra—was indebted to the plaintiff and other residents of England, whose names plaintiff does not know, in the sum of one hundred thousand dollars, for money loaned to said company; and to secure the payment thereof said company on that day made, executed, and delivered to John Ridgway, Francis Wedgwood, Josiah Bates, Hensleigh Wedgwood, and Charles Robe, its bond in the penal sum of two hundred thousand dollars, conditioned to pay said sum of one hundred thousand dollars, and a mortgage on all the property of said company in the State of California, more particularly described in said mortgage; said bond and mortgage being executed and delivered to the above named persons as trustees for the said persons to whom said company was indebted as aforesaid in said sum of one hundred thousand dollars for money loaned. That afterwards—to wit: on the 29th day of November, 1858—said company became indebted to the plaintiff and other residents of England, whose names plaintiff does not know, in the further sum of fifty thousand dollars, for money loaned and advanced by them to said company; and that, to secure the payment thereof, said company, on the said 29th day of November, 1858, made, executed, and delivered to John Ridgway, Francis Wedgwood, Josiah Bates, Hensleigh Wedgwood, Charles Robe, and this plaintiff, a bond in the penal sum of one hundred thousand dollars, conditioned to pay said sum of fifty thousand dollars, with interest at the rate of twenty per *cent. per annum, on or before the 24th [641]
day of November, 1859, and also a mortgage on all the

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property of said company in the State of California, more particularly described in said mortgage, conditioned to pay said last mentioned bond at maturity; said last mentioned bond and mortgage being executed and delivered to the obligees and mortgagees thereof as trustees for the use and benefit of the parties who loaned and advanced to said company said last mentioned sum of fifty thousand dollars, one of whom was the plaintiff. The plaintiff further shows that on or about the 5th day of October, 1859, the holders of said bonds and mortgages were induced to doubt their validity, and to cancel and release them of record, for the purpose of having executed and delivered to them (said mortgagees) by said company, a new and valid bond and mortgage for the said sums of money, and on the whole of the property of said company in the State of California. Whereupon the said company, by its trustees, at a regular meeting of said trustees, held at Forest City, on the 5th day of October, 1859, accepted the said cancellation and release of the two bonds and the two mortgages first above described, and ordered the release of said two mortgages to be entered of record in the office of the Recorder of the county of Sierra, which was done; and then and there agreed and resolved, in consideration of the releasing and cancelling of said two bonds and two mortgages first above described, and an additional advance and loan of ten thousand pounds sterling, to be made to said company by this plaintiff and other residents of England, to make, execute, and deliver to John Ridgway, Francis Wedgwood, Hensleigh Wedgwood, Charles Robe, and this plaintiff, the promissory note of said company for the sum of forty thousand pounds sterling, and a mortgage, to secure the payment of the same, on all the water ditches, reservoirs, water rights, buildings, structures, and other property, real and personal, constructed or in the process of construction, belonging to said company in the State of California; said last mentioned note
[642] and mortgage to be held by said Ridgway, *Wedgwood, Robe, and this plaintiff, for the sole use, benefit, and security of the said persons who had loaned to said company said sums of one hundred and fifty thousand dollars, and who should thereafter advance and loan to said company said sum

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of ten thousand pounds sterling. That afterwards—to wit, on the 16th day of April, 1860—said company, by its trustees, at a regular meeting of said trustees, held at Forest City, re-affirmed said last mentioned resolution and agreement in regard to said last mentioned note and mortgage; and then and there—to wit, on the 16th day of April, 1860, at said Forest City—for the consideration aforesaid, made and delivered the last above described promissory note of said company for the sum of forty thousand pounds sterling, with interest thereon from date till paid, at the rate of twenty per cent. per annum, payable one day after the date thereof, to the order of said Ridgway, Francis Wedgwood, Hensleigh Wedgwood, Charles Robe, and this plaintiff; and to secure the payment thereof, then--to wit, on said 16th day of April, 1860—executed and delivered to the said Ridgway and other payees of said promissory note its (said company's) mortgage, in the words and figures following, to wit:

"This indenture made the 16th day of April, A. D. 1860, between the Sierra Nevada Lake Water and Mining Company, a corporation, by their trustees, Josiah Bates of Sierra county, State of California, and Samuel S. Atchinson of Yuba county, State of California, of the first part, and John Ridgway, Francis Wedgwood, Hensleigh Wedgwood, Charles Robe, and Jos. Love, all of England, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of forty thousand pounds sterling, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do grant, bargain, sell, and convey unto the said parties of the second part, their heirs and assigns, all the property, real and personal, belonging to the said Sierra Nevada Lake Water and Mining Company aforesaid, a corporation duly existing under and by virtue of the laws of *California, located and being [643] situated in the county of Sierra, and State of California, and consisting of water canals, ditches, flumes, aqueducts, reservoirs, etc., now constructed or in process of construction by said company, together with all the right, title, or interest in and to the present possession, and the right to the posses-

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sion of any and all the waters, or the use and benefit of said waters for mining and other purposes, of any stream or streams, or rivers, ponds, and lakes, within the State of California, owned by said company of the first part, or claimed by them, or now in their possession, together with all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining. This conveyance is intended as a mortgage to secure the payment of a certain promissory note bearing even date herewith, made by the said Sierra Nevada Lake Water and Mining Company, by the said trustees to the parties of the second part, in the words and figures following:

"[£40,000.]

"One day after date, we promise to pay to the order of John Ridgway, Francis Wedgwood, Hensleigh Wedgwood, Charles Robe, and Joseph Love, the sum of forty thousand pounds sterling, with interest thereon from date until paid, at the rate of twenty (20) per cent. per annum, for value received, this 16th day of April, A. D. 1860. And the said parties of the first part shall well and truly pay, or cause to be paid, the sum of money with interest thereon, according to the tenor and effect of said note, then these presents to be null and void, otherwise to remain in full force and effect.

"In witness whereof, the said parties of the first part have hereunto set their several hands and seals, the day and year above written.

"JOSIAH BATES. [SEAL.]
"SAMUEL S. ATCHINSON." [SEAL.]

[644] *"STATE OF CALIFORNIA, }
"County of Sierra. }

"On this 16th day of April, A. D. 1860, before me, James A. Clark, a Notary Public, in and for the county of ———, personally appeared Josiah Bates and Samuel S. Atchinson, to me personally known to be two of the trustees of the Sierra Nevada Lake Water and Mining Company, and to be the persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they

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executed the same freely and voluntarily, and for the uses and purposes therein mentioned, as and for the free act and deed of said Sierra Nevada Lake Water and Mining Company.

"In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year above written.

[L. S.] "JAMES A. CLARK,
"Notary Public."

And plaintiff avers that the above mortgage, with the acknowledgment thereon, was duly recorded in the office of the Recorder of the said county of Sierra, on the 17th day of April, A. D. 1860, at eleven o'clock A. M. of that day; and plaintiff avers that James A. Clark was a duly qualified Notary Public for Sierra county at the time he took the above acknowledgment.

Plaintiff further alleges that at the time of the making, execution, and delivery of the last above described promissory note and mortgage, Josiah Bates and Samuel S. Atchinson were trustees of said company, and Josiah Bates was President thereof; and that as such trustees and President, the said Bates and Atchinson had full and complete power and authority for and on behalf of said company to make and deliver said note, and to execute and deliver a good and valid mortgage on all the property of said company in the State of California; and that, at and before the signing and delivery of said last mentioned mortgage, the said company, and its agents and trustees, and particularly said Josiah Bates and Samuel S. Atchinson, intended to subscribe and sign the last *mentioned mortgage the name of said com- [645] pany, to wit, "The Sierra Nevada Lake Water and Mining Company," but omitted to do so by accident and mistake, or with the fraudulent intention on the part of said Bates and Atchinson to cheat and defraud this plaintiff and the other persons who loaned and advanced to said company said sum of forty thousand pounds sterling, to secure the payment of which said last described mortgage was intended to be executed.

The Court below found among other facts that the Sierra Nevada Lake Water and Mining Company was a corporation

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duly organized, and that in consideration of forty thousand pounds loaned to it by the payees in the note, it executed the note; and, to secure the same, executed and delivered the mortgage in manner and form as alleged in the complaint, and that before and at the time of the execution of said mortgage, the said Bates and Atchinson, for and on behalf of said corporation, agreed with the said mortgagees and intended to subscribe and sign the said mortgagor the name of said corporation, to wit, "The Sierra Nevada Lake Water and Mining Company," but omitted to do so by mistake or accident. It does not appear that the subsequent lienholders had any notice of the mortgage except by the recording thereof. Judgment was rendered in favor of the plaintiff enforcing the mortgage against both the corporation and the subsequent lienholders. The corporation and the subsequent lienholders appealed.

The other facts are stated in the opinion of the Court.[1]

James A. Johnson and *Creed Haymond*, for Appellants.

It can make no difference even if there was a mistake in the execution of the note and mortgage, such mistake being as to the legal effect of a written instrument, *i. e.*, a mistake of law. There can be no relief from such mistakes when a reformation is necessary to obtain it. (See Story Eq. Jur. Vol. I., [646] *sec. 138; Hilliard on Real Es. and Conv. 267.) We understand it to be a universal rule, that in no case will equity interfere to reform an instrument except as between the parties thereto and their privies; as between these, Courts of equity may interfere. (See Story's Eq. Jur. Vol. I., sec. 165.) To enable a Court of equity to reform the mortgage, it must appear on its face to be executed by the corporation, for otherwise it is, as it appears in law or by legal construction, the instrument of some other person. The instrument is the mortgage of Bates and Atchinson, and not of the corporation. (See Story on Ag., secs. 147–151; Pars. on Cont., Vol. I., p. 119; Richardson *v.* Scott River W. and M. Co., 22 Cal. 155.)

[1] [NOTE.—A former opinion had been delivered and decision given by the Supreme Court in this case, but on petition of respondents' attorney a rehearing was granted.]

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Equity then cannot interfere as between the plaintiff and the corporation, but only as between the plaintiff and Bates and Atchinson. One who professes to act as agent for another must act in the name of his principal. (See Clark *v.* Courtney, 5 Pet. 366; Brierly *v.* Mann, 2 Cush. 340; Stackpole *v.* Arnold, 11 Mass. 28.)

So far as concerns the plaintiff's allegation of accident or mistake it is defective, because he does not state wherein the accident or mistake consists. The note and mortgage being the instruments of B. and A., and it being alleged that they made the mistake or accident, plaintiff's business is with them, and not with the corporrtion. The corporation, and of course the lienholders, are not answerable for the mistakes, accidents, or frauds of B. and A. (Richardson *v.* S. R. W. Co., 22 Cal. 155; Aston *v.* Wells, 4 Wheat. 466.) From the last case cited it would appear to be no difference, so far as concerns even the corporation, whether B. and A. intended to defraud Love or not, or whether they omitted something by accident or mistake; for if they omitted to make the note and mortgage of the corporation, they have never been made.

P. Van Clief, for Respondent.

No signature of the corporation was necessary: its seal was sufficient. (Clark *v.* Farmers' Man. Co., 15 Wend. 258; *Angell & Ames on Cor., sec. 325.) We ask particu- [647] lar attention to the case of Reynolds *v.* Glasgow Academy, 6 Dana, 37. A majority of the trustees of the corporation executed a deed purporting to be the deed of the corporation, and signed it with their several names, with a scrawl to each, without designating them as their individual seals, and it did not appear that the corporation had any regular seal: *held*, that the scrawls must each be taken as the seal of the corporation, the repetition of it on the same deed not being a matter of any importance. It is proper in equity to plead equitable mortgages as executed mortgages. Indeed, they are so, by equitable construction of the facts constituting them. Equity pronounces them equitable mortgages, in obedience to its maxim "that equity looks upon that *as done* which ought to have been done." This maxim is the parent

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of all equitable mortgages. (Decker *v.* Kernan, 2 Ker. 361; Van Sant. Eq. Pl. 91; Id. Eq. Pr. 92.) A mortgage is not required to be under seal in this State, and, as a simple contract, the mortgage set out in the complaint is well executed, without the signature of the corporation, since it distinctly appears in the body of the instrument, in the acknowledgment of it, and in the resolutions of the corporation, that the corporation alone was intended to be bound, and there is no question as to the authority of Bates and Atchinson to bind it. A mortgage in this State does not touch either the legal or equitable title to land, and it certainly does not touch or affect the possession. (Ingoldsby *v.* Juan, 12 Cal. 576; Green *v.* Hart, 1 John. 589.) A good and valid mortgage of real property may be executed in this State by simple contract in writing, without seal. A mortgage creates no estate or interest in realty. It is a mere security for a debt, and possesses only a chattel interest. A parol assignment of the debt carries with it all the interest and estate created by the mortgage. (9 Cal. 365, 426; 13 Cal. 13; 15 Cal. 293; 16 Cal. 468; 21 Cal. 609; Lent *v.* Morrill, 25 Cal. 492; see also Green *v.* Hort, 1 John. 589, and 11 John. 537.) "An express agreement that land shall be chargeable with and security for the pay-
[648] ment of a debt, though *interpreted as a legal mortgage, will be regarded as a mortgage in equity, and forced against a purchaser without notice." (1 Hilliard on Mort. 613, note.) "An agreement in writing to give a mortgage, or a mortgage defectively executed, or any imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien *which will have precedence of subsequent judgment creditors.*" (1 Lead. Cas. in Eq. 666, and fourteen cases there cited.) "When it is expressly agreed to give a lien upon lands, Courts of equity have long held that such an agreement was to be treated and considered as giving a specific lien upon the land." (25 Barb. 302; 4 Bosw. 266; Chase *v.* Peck, 21 N. Y. 581.)

The result of the foregoing and other authorities of the same class is that though our mortgage should be found to have been defectively executed, still when taken in connec-

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tion with the agreement evidenced by the records of the corporation, it must be held to be an equitable mortgage, creating a specific lien, which has *precedence of all subsequent* judgment liens, though it might not be good against subsequent purchasers *without notice*. Whether the omission of the signature is by the party attempting to execute his own deed, or by an agent acting under a power, can make no difference as to the jurisdiction of the Court, because the jurisdiction, in either case, goes on the ground of mistake, accident, or fraud, and does not at all depend upon the subject-matter of the contract, or the manner of its attempted execution. Mr. Justice Story (1 Eq. Jur., sec. 94) says: "In the execution of mere powers, it has been said that a Court of equity will interpose and grant relief *on account of accident, as well as of mistake.* And this seems equally true where, by accident, there is a defective execution of the power." Again, at section one hundred and seventy, after stating that the Court will not interfere to compel the execution of a voluntary power, depending solely on the will of the donee, when there has been no attempt to execute it, he says: "But when all has been done to perfect the right, except the mere formal omission(?) in the *instrument, Courts of equity interfere to sup- [649] ply the defect, *upon the principle of reforming the instrument* and *correcting mistakes generally*, for the purpose of preventing fraud and injustice of which the party would be guilty by claiming a benefit *under a mere mistake.*" Mr. Justice Willard, in his work on Equity Jurisprudence, p. 83, says: "Equity sometimes relieves in case of a defective execution of a power, *on the ground of accident or mistake*, but not in case of a non-execution of a power, as distinguishable from a trust."

By the Court, SHAFTER, J.:

In the opinion delivered in this case on the former hearing, we considered, "that it was unnecessary to determine whether the entire transaction was sufficient to constitute an equitable mortgage, for if such should be found to be the case it could not be enforced in the present state of the pleadings, because the decree must be based upon the allegations of the com-

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plaint; and it is alleged that the mortgage was executed by the corporation—that is to say, that it is a legal mortgage." Though there is an averment in the complaint that the mortgage, the foreclosure of which is sought in this action, was executed by the company, still the document is set forth in *hæc verba*, and if it is not the mortgage of the defendant by legal as distinguished from equitable conclusion, the averment may be rejected as surplusage. We held in Stoddard *v.* Treadwell, 26 Cal. 303, that a contract may be declared on according to its legal effect or in *hæc verba*. If the former mode should be adopted, then the defendant may, by the rule of the common law, in a proper case, crave *oyer* of the instrument; and if it appear that its provisions have been misstated, he may set out the contract in *hæc verba* and demur on the ground of variance. But where a plaintiff himself sets forth the contract in the terms in which it is written, and then proceeds to put a false construction upon its terms, the allegation, as repugnant to the terms, should be regarded as [650] surplusage, *to be struck out on motion. *Utile per inutile non vitiatur.* From this it follows that if the complaint in this case discloses all the facts essential to an equitable mortgage binding upon the defendant, then, if the averments are true in fact, the plaintiff is entitled to the benefit of them. And further, by the one hundred and forty-seventh section of the Practice Act, the Court "may grant him any relief consistent with the case made by the complaint and embraced within the issue." We have re-examined the complaint in the light thrown upon it by the re-argument, and are satisfied that it contains all the facts essential to an equitable mortgage. As the facts averred are identical with the facts found or admitted, it is unnecessary to state the form in detail; for, in passing upon the legal effect of the finding, we must necessarily consider and pass upon the legal effect of the averments.

As the statement on motion for new trial does not specify the particulars in which the evidence is alleged to be insufficient, we must assume not only the facts admitted in the pleadings, but those also which are set forth in the findings. It appears from these two sources conjointly that the defend-

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ant corporation on the 16th of April, 1860, by Josiah Bates and Samuel S. Atchinson, its trustees, duly authorized for that purpose, made and delivered to the plaintiff and four others, its promissory note for the sum of forty thousand pounds sterling, payable one day from the date thereof, with interest thereon from date until paid, at the rate of twenty per cent. per annum. That the consideration of said note was forty thousand pounds, loaned and advanced by the payees and others to the corporation before the date of the note. That to secure the payment of the note the corporation at the date thereof, by its said trustees, Bates and Atchinson, executed, acknowledged, and delivered to the payees the "mortgage" set out in the complaint. In the indenture referred to, the parties are described as "The Sierra Nevada Lake Water and Mining Company, a corporation, by their trustees, Josiah Bates and Samuel Atchinson, of the first part, and plaintiff *(and the other payees in the note, naming [651] them) parties of the second part." The conclusion of the indenture is as follows:

"In witness whereof, the said parties of the first part have hereunto set their several hands and seals, the day and year above written.

"JOSIAH BATES. [SEAL.]
"SAMUEL S. ATCHINSON." [SEAL.]

The acknowledgment of the mortgage is to the effect that Bates and Atchinson were personally known to the Notary as trustees of said corporation, and that they personally appeared and acknowledged each for himself that he executed the instrument for the uses and purposes therein mentioned, "as and for the free act and deed of said Sierra Nevada Lake Water and Mining Company." At the execution of the note and mortgage, Bates was President of the company, and Bates and Atchinson were a majority of the trustees; and at and before that time, they agreed for and on behalf of said corporation with the said mortgagees to subscribe the name of "The Sierra Nevada Lake Water and Mining Company" to the said mortgage, and intended so to do, but failed by accident or mistake. The plaintiff was personally interested in

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the securities to the amount of twenty-four thousand eight hundred and forty-seven pounds sterling, with interest from the date of the note; and the other payees, Ridgway, F. and H. Wedgwood, and Robe, made defendants herein, refused to join as plaintiffs in this action. The remaining defendants are creditors of the Sierra Nevada Lake Water and Mining Company, having judgment liens on the property described in the mortgage, but subsequent thereto.

It is a rule of conveyancing long established, that deeds executed by an attorney or agent must be executed in the name of the constituent. It was so resolved in Coombes' Case, (5 Coke, 135, by Fraser,) and the rule was recognized and applied by us in Echols v. Chenery, 28 Cal. 159.

[652] Tested by this rule, *the instrument in suit is not a legal mortgage of the Sierra Nevada Lake Water and Mining Company. The paper is signed and sealed, not by the corporation, but by Bates and Atchinson, acting, so far as the signatures, seals, and testatum clause throw any light upon the subject, for themselves and in their own right. Though the mortgage does not bind the company at law, it by no means follows, however, that it may not be asserted against it in equity. We consider it as settled that an agreement under seal, made by an attorney for his principal, though inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority; and if the instrument so defectively executed be a conveyance of real estate, it will be sustained in equity as an agreement to convey, and will be good against the principal, subsequent lien creditors, and subsequent purchasers with notice. Or, more precisely stated, an agreement in writing to create a mortgage, or a mortgage defectively executed, or any imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien, which will have precedence of subsequent judgment creditors. (Am. Lead. Cas. 605; 1 Lead. Cas. in Eq. 666, and cases there cited.) The jurisdiction is sometimes put upon the ground that equity will aid the defective execution of a power—sometimes upon the jurisdiction to reform mistakes

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in written instruments, and sometimes upon the maxim that equity considers that as done which ought to be done. These different modes of expression all amount to the same thing in substance. It was held by this Court in Beatty v. Clark, 20 Cal. 12, that "though equity will not aid the non-execution of a power, still, where a party undertakes to execute a power, and by mistake does it imperfectly, equity will, in favor of creditors and others peculiarly within its protective favor, aid the defective execution." We held in Bodley v. Ferguson, 30 Cal. 511, that a deed of land had as a conveyance might be good in equity as a contract to convey; and that the equitable right to the legal title was as available for the purposes of *defence in an action of ejectment, under our sys- [653] tem, as the legal title. We held in Daggett v. Rankin, 31 Cal. 322, "that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate particular property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien upon the property so intended to be mortgaged." We considered further "that the maxim in equity upon which this doctrine rests is that equity looks upon things agreed to be done as actually performed; the true meaning of which is, that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been. (See also Racouillat v. Sansevain, ante 376.) The facts found or admitted in the case at bar bring it broadly within these principles. Bates and Atchinson were a majority of the Board of Trustees through which the corporate powers were to be executed. The corporation gave the note described in the complaint by Bates and Atchinson, they being duly authorized for that purpose; and they also agreed, "for and on behalf of the corporation," to give a mortgage collateral to the note, to which mortgage the name of the company was to be signed; and the failure to do so was the result of accident or mistake. The power being given, it is apparent on the face of the indenture that the trustees intended to act under the power in the matter of executing the mortgage. The cor-

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poration is named in the document as "party of the first part, by Josiah Bates and Samuel Atchinson, Trustees." The note which the mortgage was given to secure is described as a note made by the company. Furthermore, the trustees state in their acknowledgment that they executed the mortgage "as and for the free act and deed of said Sierra Nevada Lake Water and Mining Company."

It is urged that the defective execution of the mortgage was caused by a mistake of law, and that therefore the defective execution cannot be aided. The answer is, that where there is a defective execution of a power, it is a matter of no [654] *equitable moment whether the error came of a mistake of law or a mistake of fact. It is enough that the power existed, and that there was an attempt to act under it. The relief is not so much by way of reforming the instrument as by aiding its defective execution; which aid is administered through or by the application of the maxims already quoted. Or, as in the class of cases to which this belongs, the instrument defectively executed as a deed is considered as properly executed as a contract for a deed; and therefore as requiring neither reformation nor aid, but as ripe for enforcement according to the methods peculiar to courts of equity. Under our laws, a contract for a mortgage need not be under seal; and when made through an attorney, his authority need not be evidenced by a sealed instrument. (Wood's Dig. 106, sec. 6; Ang. & Ames on Corps. 193–266.) Though the indenture in this case is under the seals of the trustees, yet when considered as an agreement for a mortgage, it may be treated as a simple contract, nevertheless, (Lawrence *v.* Taylor, 5 Hill, 107; Worrall *v.* Munn, 1 Seld. 239; Wood *v.* A. & R. R. R. Co., 4 Seld. 167,) and we consider it clear, from the authorities, that it is not indispensable, in order to bind the principal at law even, that such contract should be executed in the name and as the act of the principal. On the contrary, it will be sufficient, if upon the whole instrument it can be gathered from the terms thereof that the party described himself and acts as agent, and intends thereby to bind his principal and not to bind himself. (Haskell *v.* Cornish, 13 Cal. 45; McDonald *v.* Bear River and A. W. and M. Co. 13 Cal. 221.)

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The other objections taken by the appellants to the judgment, though not pressed in argument, have been fully considered by us, and they are all overruled.

Judgment affirmed.

L. M. WARDEN v. MENDOCINO COUNTY. [655]

UNDERTAKING ON APPEAL.—No undertaking on appeal is necessary when the appeal is taken by a county.

DENYING NEW TRIAL.—An order dismissing a motion for a new trial is in effect denying a new trial.

[1] BILL OF EXCEPTIONS.—If a bill of exceptions, made to an order dismissing a motion for a new trial, recites the giving of a notice and the different steps taken in prosecuting the motion, it will be received in the appellate Court as evidence of the facts recited, without including the notice, statement, etc., in the transcript.

AMENDMENTS TO STATEMENT.—A reasonable time to prepare and file amendments to a statement on motion for a new trial is five days.

RULE OF COURT.—The appellate Court will not presume what are the rules of the Court below when they are not in the record.

REASONABLE DILIGENCE IN MOVING FOR NEW TRIAL.—If the Judge who tried a cause goes to a county in his district not adjoining the one in which the case was tried, to hold Court, before the time for filing amendments to the statement on motion for new trial has expired, the moving party prosecutes the motion with due diligence if he brings the same to a hearing when the Judge returns or first holds Court in a county adjoining the one in which the case was tried.

APPEAL from the District Court, Seventh Judicial District, Mendocino county.

The facts are stated in the opinion of the Court.

Thomas B. Bond, for Appellant.

George Cadwalader, for Respondent.

By the Court, CURREY, C. J.:

The plaintiff, the Sheriff of Mendocino county, brought this action for fees alleged to be due him for services rendered

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[1] Disapproved, Wetherbee v. Carroll, 33 Cal. 556.

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in criminal cases in behalf of the county, extending over a period commencing in June, 1865, and ending in February, 1866. The defendant demurred to the complaint. The demurrer being overruled, an answer was filed meeting the allegations of the complaint either by direct denial or by matters in avoidance. The cause was tried on the 24th of July, 1866, before the Judge, without a jury, which resulted in a judgment for the plaintiff. The transcript of the record shows that, on the 16th of October, 1866, the Judge at
[656] Chambers in *Santa Rosa, Sonoma county, made an order "dismissing the defendant's motion for a new trial," on the ground of delay in bringing said motion to a hearing. Whereupon the defendant's attorney prepared, and procured to be settled and signed by the Judge, a bill of exceptions to the ruling and order dismissing the motion for a new trial, from which it appears that the cause was tried and judgment rendered against the defendant on the 24th of July, 1866; that written findings of the Court were filed and a notice thereof served on the defendant on the 23d of August, and that a notice of motion for a new trial in due form was made on the 1st of September. That the Court made an order granting to the defendant twenty days after service of notice of the findings in which to file statement on motion for a new trial; which statement was filed on the 12th of September. That on the 13th of October, the defendant gave notice to the plaintiff that he would apply to the Judge to settle the statement, and thereupon move for a new trial. That no amendments to the statement were proposed, but instead the plaintiff moved to dismiss the motion, which, as we have seen, was granted; to which ruling the defendant excepted.

The defendant appealed from the judgment, and, as the notice expresses it, "from the order of the District Judge overruling defendant's motion for a new trial;" which, in fact, was a result accomplished by the order made.

The plaintiff has interposed an objection to this Court entertaining jurisdiction of the case, because no undertaking on appeal appears to have been executed. It is only necessary to say in respect to this objection, that the act entitled "An act concerning Appeals in certain cases" is a complete

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answer to it. (Stats. 1856, p. 26; People v. Marin County, 10 Cal. 346.)

It appears from the bill of exceptions, the object of which was to preserve an exception to the ruling of the Judge dismissing the motion for a new trial, that notice of the findings of the Court was served on the defendant on the 23d of August, and that within ten days thereafter, a notice of motion *for a new trial on the part of the defendant [657] was served on the plaintiff, and that within the time allowed by the Court after notice of the findings, the defendant prepared and filed a statement to be used on the motion for a new trial. No amendments were proposed to the statement, nor does it appear that the statement was agreed to by the plaintiff. The defendant's attorney, as the bill of exceptions shows, gave notice of his intention to apply to the Judge who tried the cause to settle the statement, and immediately thereafter moved the Judge to grant a new trial. The bill of exceptions, signed by the Judge, stating the facts to be as above set forth, must be regarded as evidence before this Court that the notice of motion for a new trial was given, and a statement to be used on such motion was prepared and filed in due time, and though neither the notice nor the statement is contained in the record before us, we must, upon the statement of the Judge contained in the bill of exceptions, presume them to have been in proper form.

The question which is presented upon the record is whether the order dismissing the application for a new trial can be sustained or must be reversed. All that is required on the part of the defendant in such cases is to prosecute the motion with due diligence. The statute does not specify the time within which amendments to a statement shall be prepared, nor the time within which the adverse party must agree to the statement prepared in case he does not choose to propose amendments thereto. But as the adverse party is allowed to propose amendments to the statement, he has by the practice of the Courts a reasonable time for the purpose, and we may well assume that he was reasonably entitled to the same time as the statute, independent of an order of the Court allowing

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further time, gives to the moving party to prepare and file a statement on his part, which is five days. (Pr. Act, sec. 195.) Then the defendant could not have moved for a settlement of the statement by the Judge, before the 18th of September, at which time it must be intended the Judge was [658] *holding the Solano county term of the District Court, which commenced on the third Monday of September of that year. The motion could not be made in the last named county for the reason that it did not adjoin Mendocino county. (Pr. Act, sec. 516.) Following the Solano county term was that of Napa county, which commenced on the first Monday of October, and because that county did not adjoin Mendocino the motion could not be made there. The earliest opportunity afforded the defendant to bring on the application for a new trial was on the 15th of October, when the District Court commenced its term in Sonoma county. The application was made as already stated on the 16th of the month last named, when it was dismissed on the plaintiff's motion, on the alleged ground of delay in bringing it to a hearing. The plaintiff's counsel undertakes to justify the action of the Judge in making the order of dismissal, on the ground that a rule of his Court required motions for a new trial to be brought to a hearing within thirty days after the trial of the cause. It does not appear from the transcript that there was such a rule, and it is not to be presumed there was, especially as a rule which in effect would operate to deny to a party a substantial right cannot be presumed to exist; and we may say if it was in evidence that there was such a rule, it could not be upheld; for rules of Court are adopted to subserve and facilitate the ends of justice, and not to frustrate and defeat rights which are conserved and protected by the law. The defendant, it seems, prosecuted his application for a new trial with all the diligence that was reasonable or practicable, and there was no just pretence for holding otherwise; if there was, we should not disturb the order on this account. As the order dismissing the motion for a new trial must be reversed, it is not necessary to express any opinion respecting the other questions raised on the part of the defendant. Such other ques-

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tions are not difficult of solution, and it is the province of the District Court to pass upon them when the motion of a new trial may be made.

The order dismissing the motion for a new trial is reversed *and the cause is remanded, with directions [659] to the Court below to settle the statement and pass upon the motion for a new trial.

Mr. Justice SANDERSON did not express any opinion.

CHARLES D. SEMPLE *v.* SAMUEL M. WRIGHT.

[1] CONFIRMATION OF GRANTS OVERLAPPING EACH OTHER.—If two Mexican grants of land, made to different persons, are confirmed, and surveyed so as to overlap each other in part, and the owner of one becomes a party to the proceedings relating to the confirmation and survey of the other, he is bound by the proceedings, and estopped from afterwards denying that this grant was properly located.

STIPULATION CONCERNING JUDGMENT.—A stipulation between parties to an action as to the kind of judgment to be entered, whatever force it may have in regulating the judgment to be entered, does not impair the effect of the judgment which is entered, even if not entered in accordance with the stipulation.

[2] FORMER JUDGMENT IN BAR MUST BE PLEADED.—If two Mexican grants are so confirmed at different times as to overlap each other, and the owner of the one confirmed last is a party to the proceedings confirming the other, and the owner of the one confirmed first becomes a party to the proceedings resulting in the last confirmation, and fails to set up the first confirmation as a bar to having this grant confirmed so as to cover the same land, he cannot afterwards attack the last decree in a collateral proceeding.

JUDGMENT BY CONSENT.—One who is a party to an action and consents to a judgment, cannot afterwards attack this judgment in a collateral proceeding.

APPEAL from the District Court, Tenth Judicial District, Colusa county.

This was an action to recover possession of a lot in the town of Colusa. The complaint was in the usual form. The answer contains a denial of all the allegations of the complaint, and sets up title in the defendant under the Jimeno

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[1] Cited, Bernal *v.* Lynch, 36 Cal. 144; Yates *v.* Smith, 38 Cal. 61, 63. See Id. 72; Bissell *v.* Henshaw, 1 Saw. 583; Hagar *v.* Spect, 48 Cal. 408.

[2] Cited, Semple *v.* Ware, 42 Cal. 621.

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grant. The plaintiff proved title to the demanded premises under the Colus grant, and the defendant showed title under the Jimeno grant. The Jimeno grant was of eleven leagues, and bore date on the 4th day of November, 1844, and was presented to the Board of Land Commissioners for confirmation on the 24th day of March, 1852, and confirmed by the Board on the 10th day of January, 1853. It was confirmed by the District Court of the United States on the 5th
[660] day of *July, 1855, and by the Supreme Court of the United States at its December term for the year 1855.

The Colus grant was of two leagues, and bore date on the 4th day of October, 1845, and was presented to the Board of Land Commissioners for confirmation on the 31st day of March, 1852, and rejected by the Board on the 25th day of October, 1853. It was confirmed by the District Court of the United States on the 5th day of July, 1855, and an appeal from the decree of the District Court was dismissed by the Supreme Court of the United States at its December term for the year 1855. The final official survey of the Jimeno grant was confirmed and adopted on the 6th of April, 1861, by a decree of the District Court, and an appeal from that decree to the Supreme Court was dismissed on the 29th day of May, 1862. Upon this final survey a patent was issued to the claimants on behalf of the United States, bearing date on the 18th day of July, 1862.

The final official survey of the Colus grant was confirmed and adopted on the 2d day of February, 1861, by a decree of the District Court, and an appeal from that decree to the Supreme Court was dismissed at the December term of said Court for the year 1864. The final survey and patent of the Jimeno grant, and the final survey of the Colus grant, cover the lot in question.

While the final survey of the Jimeno grant was before the District Court for confirmation, according to the provisions of the act of Congress of the 14th day of June, 1860, C. D. Semple filed in said Court his intervention in the words and figures following, to wit:

"This day came Charles D. Semple, before me, Clerk of

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said Court, and made oath that heretofore, in this Honorable Court, there was a grant of eleven leagues of land called the Jimeno grant, situated in the counties of Colusa and Yolo, on the west bank of the Sacramento River, confirmed to the above named defendants; that before the final confirmation of said grant the said Missroon sold his entire interest therein; that the said *Larkin also sold, before his [661] death, and before the final confirmation, his entire interest except about two thirds of one league, which this affiant is informed now belongs to the heirs of the said Larkin; that this affiant is now the owner of about two thirds of one league of said grant, claiming title under said Larkin and Missroon by mesne conveyances from them. Affiant further says that Missroon is an officer in the United States Navy, and never took any part in the management of the case, but that Larkin had the entire control of it until the final confirmation. A controversy then arose between some of the principal owners, when Larkin retired from the case, leaving the management of the survey to this affiant and some two others. A survey was ordered and made by the United States Surveyor-General for the State of California, which was protested against by this affiant, and the matter was referred to the Secretary of the Interior, and said survey was set aside and a new one ordered, which last survey was made in the month of October, 1858, and approved by the Surveyor-General aforesaid. Now this affiant says, that by this last approved survey said Jimeno grant is not properly located; that it is located to the extent of two leagues upon land claimed by the owners of the Colus grant, containing two leagues, finally confirmed to this affiant; and this affiant believes that the title to the Colus grant is superior to the title of the Jimeno grant to the same land, so that if the title to the Colus grant shall prove to be the superior and better one, then this affiant will lose about one-half of his aforesaid interest.

"Affiant further says that there is more than eighteen leagues contained within the map or diseño of the said Jimeno grant, and that the whole maximum of land may be surveyed within the diseño without interfering with the land claimed by the claimant of the Colus grant.

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"Therefore, this affiant prays that an order may issue out of this Honorable Court, directing that the said approved survey may be returned into this Honorable Court for its adjudication and decision."

[662] *While the final survey of the Colus grant was before the said United States District Court for confirmation, according to the provisions of the act of Congress of the 14th June, 1860, George Hagar filed in said Court his intervention, in the words and figures following, to wit:

"In the District Court of the United States for the Northern District of California. *The United States* v. *Charles D. Semple, Claimant.* No. 28.

"Now comes George Hagar, by leave of the Court first had and obtained, and intervenes in this proceeding, and excepts to the approved survey (containing eight thousand eight hundred and seventy-six and two one-hundredths acres) of the Colus Rancho filed in this case, because it embraces land granted to Manuel Jimeno (the grantor of said Hagar) by the Mexican Government, in the year 1844, and before the date of the Colus Rancho; and the said George Hagar, intervenor herein, in support of said exceptions, alleges and says, etc. [Here the intervenor goes on at great length to give many reasons why the Colus survey should not be approved, and then proceeds.] And the said intervenor would further represent that he is now the legal owner and holder, by good and sufficient mesne conveyances from the said Larkin and Missroon, of the larger portion, to wit, more than five thousand acres of the land so embraced as aforesaid by the said survey of the said Colus Rancho." [Then follows other statements immaterial to the issues in this case.]

An order was made by the United States District Court, on the 5th day of January, 1861, allowing the said Hagar to withdraw his intervention in the said Colus survey case.

An agreement was entered into on the 4th day of January, 1861, between C. D. Semple and George Hagar, in the words and figures following:

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"In the District Court of the United States for the Northern District of California. *The United States* v. *Larkin and Missroon, Claimants for Jimeno Rancho.* No. 23. Whereas, *Charles D. Semple, claimant of the Colus [663] Rancho, case No. 28, has intervened under the provisions of the act of Congress, approved June 14th, 1860, in the matter of the survey and location of the lands claimed in the above entitled cause of Larkin and Missroon; and whereas, George Hagar, claiming a portion of the Jimeno Rancho, has intervened in the matter of the survey and location of the Colus Rancho: Now, therefore, to dispose of said interventions and the exceptions to said surveys, it is hereby stipulated and agreed between the said Hagar and Semple, intervenors as aforesaid, that the said Hagar, intervenor in the matter of the location and survey of the Colus Rancho, shall and does hereby withdraw his exceptions to the said survey, and dismiss his petition to intervene. And the said Charles D. Semple, intervenor as aforesaid in the said Jimeno case, shall and does hereby withdraw his intervention in the matter of the survey and location of the said Jimeno Rancho, save and except for the sole purpose of opposing its location over and upon the survey of the said Colus Rancho, should such effort be made. And the said Semple, claiming a portion of the said Jimeno Rancho, hereby further agrees to coöperate with A. C. Whitcomb, attorney of record in the said Jimeno case, to obtain such location and survey of the said Jimeno Rancho as the said Whitcomb may think legal and proper, and to the interest of the owners thereof, provided always said location be not made or attempted upon or over the survey of the said Colus Rancho.

"Dated at San Francisco this 4th day of January, 1861.

(Signed) "GEORGE HAGAR, Intervenor.
"C. D. SEMPLE, Intervenor."

At the time he intervened in the Jimeno case, C. D. Semple was the owner, by mesne conveyances from Larkin and Missroon, of one undivided third part of the upper or northern two square leagues of the Jimeno grant; and these said two leagues, according to the patent of the Jimeno grant, overlap

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and interfere with the Colus approved survey to the extent of more than five thousand acres.

[664] *When the decree was rendered finally confirming the survey of the Jimeno grant, C. D. Semple, intervenor, was present in Court and consented to said decree.

Judgment was rendered by the Court below in favor of the defendant, and the plaintiff appealed.

Bowie & Catlin, for Appellant.

The Jimeno is the elder *grant*, but not the elder *title*, to the land segregated by the survey decree of the Colus. Both were inchoate titles, being grants for certain quantities, the one for eleven, the other for two leagues, within exterior limits containing nineteen leagues, and were not perfected so as to attach to particular and definite tracts by segregations under the former Mexican Government. The inchoate characters of the two grants continued until they ripened into perfect titles by proceedings in each case under the acts of Congress of 1851, and of June 14th, 1860. The appellant claims that the Colus grant became a perfect title to the identical two leagues embraced within the designated boundaries of the survey decree upon the 2d day of February, 1861. And that the Jimeno grant was not perfected until the 6th day of April, 1861, and that, in so far as the Jimeno overlaps the Colus, it is good for naught; that to the extent of such overlapping, the Jimeno carries no more title than a subsequent deed from the same grantor would carry to such portion of land as it might contain which had been granted away in a prior deed. In support of this proposition, when applying it to these two grants, and in attempting to demonstrate that a younger grant may be a better title to a given lot of land, we depend mainly upon what we deem the virtue and effect of the act of June 14th,1860. Besides, as an abstract proposition of law, it is certain that the later grant, with definite boundaries, will prevail over the elder with quantity only certain, the two being inside of a designated area large enough to satisfy both. (United States *v.* Fremont, 17 How. 558.)

Hagar confessed the judgment in the Colus case without

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qualification, by withdrawing his intervention. Semple *consented to the Jimeno decree, and what quality that [665] consent gave to the decree must be determined by the pleadings in the case. His plea alleged that the survey would deprive him of a portion of his interest in the Jimeno lands, and he consented to such deprivation. This is the only effect of that decree upon him. If anything were wanted to prove what we contend for, we could invent nothing more effective than the stipulation which was intended to and did settle and fix the exact character and effect of both decrees. (Sizer *v.* Miller, 2 How. Pr. 44; Miller *v.* Harris, 19 Cal. 278.) Hagar, the Jimeno claimant, performed his part of the stipulation on the following day, and the Colus survey was accordingly approved on the second of the next month. Afterwards, upon the coming in of the Jimeno survey, Semple performed his part of it, by consenting to the decree in that case. When this agreement was entered into, Semple, as Colus claimant, owned eight thousand eight hundred and seventy-six acres, and also owned to the extent of two thousand nine hundred and fifty-nine acres in the Jimeno. There was more than room enough within the exterior bounds of the grants for him to obtain both amounts. Hagar, to secure Semple's consent to such *form* of survey of the Jimeno as he desired, agreed that the two leagues belonging to the Colus should be first segregated and confirmed. This having been settled and accomplished by the final decree in the Colus case on the 2d of February, Semple and Hagar remained in Court as parties in the Jimeno case. They were both out of Court so far as the Colus was concerned, and the Colus itself was out of Court so far as the Court was concerned. Semple then, living up to the full spirit of his agreement, as he was bound to do, agreed to the Jimeno survey, and waived the reservation which he had made for his own protection as a Jimeno owner. If the agreement, by reason of such reservation, seemed, in the first instance, to give him an undue advantage, his after waiver of the reservation made it mutually fair and beneficial to both parties. To hold that Semple's consent in the Jimeno *case should bind him, and that Hagar's con- [666] sent in the Colus case should be ineffectual for the pur-

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pose which it was understood to accomplish by both parties, would destroy the mutuality of the contract by giving to one party and denying to the other all the benefits of it.

By the Court, RHODES, J.:

The case is presented on a statement which contains a summary of the pleadings and the findings and judgment. The contest grows out of a conflict between the surveys of the Jimeno Rancho and the Colus Rancho. The facts in relation to the title to each of those ranchos, the confirmation of the titles, the official surveys, the confirmation of the surveys by the District Court, the appeals to the Supreme Court of the United States from the decrees confirming the surveys, and the dismissal of the appeals, are substantially the same as are stated in Treadway *v.* Semple, 28 Cal. 652. We did not, in that case, nor do we in this, intend to lay down any new rules or principles for the government of that very perplexing class of cases growing out of a conflict of surveys, but wish simply to give effect to the act of Congress of the 14th of June, 1860, in regard to the survey and location of private land claims in California, and in so doing, to follow the construction of the act adopted by the Federal Courts.

In Rodrigues *v.* United States, 1 Wall. 587, those holding title under the Castro grant, contested the survey of the Sanchez grant. The Castro grant had been confirmed, surveyed, and patented prior to the passage of the act of Congress of June 14th, 1860. To the objection that the location of the Sanchez grant could not be sustained, so far as it conflicted with the Castro grant as surveyed and patented, the Court made two answers. First—That the pending proceedings were instituted to determine where the Sanchez grant ought rightfully to be located, and as the claimant of the grant was not, and had no opportunity to be, a party to any of the proceedings by which the Castro grant was confirmed, sur-
[667] veyed, *or patented, he was not bound by either the decree of confirmation, the survey, or patent; and Secondly—That those claiming title under the Castro grant had made themselves parties to the pending proceedings, and must be bound by its results. The language of the Court

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plainly indicates that it was considered that the second was a complete answer to the objection raised to the location of the Sanchez grant; and this was accepted as the correct doctrine by this Court in Treadway *v.* Semple. In that case, in considering the effect of the final confirmation of the Jimeno survey upon the title of Semple, the defendant in that case and the plaintiff in this, as determined by the prior confirmation of the Colus survey, it is said: "This must be regarded as an adjudication between the parties and with the consent of the defendant, that the plaintiff's prior grant is properly located, and that the defendant's subsequent grant to the extent of the interference was improperly located, and this determination is final and conclusive upon the right of the parties."

The plaintiff in this case does not controvert the doctrine announced in that case, and indeed he relies upon it to show title in himself under the confirmation of the survey of the Colus grant; but he endeavors to avoid its force, when invoked to uphold another and subsequent confirmation, to which proceeding he was a party. The facts of that case and this are the same, so far as they have any bearing on this question, except that in this case it is found that the plaintiff and George Hagar, the then claimant of the Jimeno grant, entered into a stipulation on the 4th of January, 1861, before the confirmation of the survey of either rancho, by which Hagar withdrew his intervention in the matter of the survey of the Colus Ranch; and Semple withdrew his intervention in the matter of the survey of the Jimeno Rancho, "save and except for the sole purpose of opposing its location over and upon the survey of the said Colus Rancho, should such effort be made." The stipulation, whatever might have been its value in regulating the decree to be entered, could not by any possibility control or impair the conclusiveness or effect of the decree *after it was *entered.* And besides this, [668] the fact appears in this case, as in Treadway *v.* Semple, that when the decree confirming the survey of the Jimeno grant was pronounced, Semple, intervenor, was present in Court and consented to said decree.

It is urged with much earnestness, that as the claimant of

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the Jimeno grant was a party to the proceeding for the confirmation of the survey of the Colus grant, he is bound by the decree, and that it is conclusive as to him, and is beyond the reach of attack in his subsequent proceedings to confirm the survey of the Jimeno grant. If such was the case, he should have set up that fact as an objection to the confirmation of the survey of the Jimeno grant; but if he failed to present that objection, or if presented it was overruled, he could not afterward rely upon that fact as a ground of collateral attack upon the decree. He would occupy no better position in that respect than would a defendant to an ordinary civil action, holding a good bar to the action, which either is not presented or is overruled by the Court. And besides this, his objections, whatever they may have been, are removed by his consent to the decree.

It is impossible to see how the plaintiff can avoid the authority of Treadway *v.* Semple, for the point now made was necessarily involved in that case. To succeed he must overthrow that case, and that cannot be done without overruling the case of Rodrigues *v.* United States. The act of June 14th, 1860, declares the value and effect of a survey in the following terms: "And the said plat and survey, so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law, as if a patent for the land so surveyed had been issued by the United States;" but the act does not specify whether the patent, to which the survey is declared to be the equivalent, is one of the character described in the fifteenth section of the act of Congress of March, 1851, to ascertain and settle private land claims in the State of California—which it is provided "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons"—
[669] *or whether it is one of a higher and more conclusive grade. No difference is expressly assigned between the value of a survey that becomes final by the approval and publication of the Surveyor-General, and one that is confirmed by the District Court. It is very clear, however, that a survey becoming final in the first mode, could not directly divest or impair the title that had already vested in a third person

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under a patent issued by the United States, because the title having been conveyed by the United States, there was nothing left to be passed by the ministerial act of the Surveyor-General. A survey that has the support of a decree of confirmation of the District Court, may have a very different and much greater value and effect. But if this question were now for the first time presented, in connection with the complicated facts found in this case, it might admit of a serious doubt, whether by this act, with the "prompt and summary decision of all controversies on surveys and locations" therein provided for, it was also intended to create a new form of action for the trial of conflicting titles to land between adverse claimants. However this may be, we feel justified in following the construction adopted by the Supreme Court of the United States as we understand the decision in Rodrigues *v.* United States, and we are the more inclined to do so, because counsel have not called in question the authority of that case.

Judgment affirmed.

Mr. Chief Justice CURREY did not express any opinion.

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INDEX.

Digitized by Google

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INDEX.

ABANDONMENT.

See WATER RIGHTS, 4.

ABATEMENT.

1. DEATH OF A PARTY ABATES ACTION.—If, after a decree of divorce which directs a division of the common property, the husband dies, a supplemental decree made after his death, without a revivor as to his heirs, directing a sale of the property and a division of the proceeds, is void as to his heirs. It is not enough that his executors are made parties in his stead. *Ewald* v. *Corbett*, 498.

ACCOUNT.

See MORTGAGE, 8, 9, 10.

ACTION TO QUIET TITLE.

See EQUITY, 1, 2; INJUNCTION, 1.

ACTIONS.

See BOND, 1; JOINDER OF ACTIONS, 1, 2; MISJOINDER OF ACTIONS, 1.

ADMINISTRATOR.

See PROMISSORY NOTE, 5; TITLE, 1; WILL, 4; JUDGMENT, 11.

ADVERSE POSSESSION.

See EJECTMENT, 2.

ALIEN.

1. RIGHT OF ALIEN TO HOLD PROPERTY.—The question of the right of a non-resident alien to hold property, at common law and under the civil law, was a matter between the alien and the Government, and could not be called in question in a collateral action between individuals. *Racouillat* v. *Sansevain*, 376.

See CONTRACTS, 2.

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AMENDMENTS.

1. AMENDMENTS TO PLEADINGS.—A motion to amend a complaint does not come too late because made after the plaintiff has closed his testimony and the defendant has moved for a nonsuit. A motion to amend is always in time when it immediately follows an objection to the complaint or answer. *Valencia* v. *Couch*, 340.

See FORCIBLE ENTRY AND DETAINER, 3.

APPEAL.

1. APPEALABLE ORDER.—No appeal lies from an order refusing to amend an order allowing time to move for a new trial. *Pendegast* v. *Knox*, 73.
2. IDEM.—No appeal lies from an order striking out a statement prepared and filed on motion for a new trial. *Id.*
3. TIME WITHIN WHICH TO APPEAL.—The one year within which to appeal from a judgment commences to run at the time the Court announces its judgment and the order for judgment is entered in the minutes, and not at the time the Clerk enters the judgment in the Judgment Book. *Genella* v. *Relyea*, 159.
4. NOTICE OF APPEAL.—A notice of appeal which states that the appeal is taken "from all orders of the District Court made and entered in the action," is insufficient. *Id.*
5. APPEAL FROM ORDER.—No appeal lies from an order striking out a statement, or from an order denying a motion to certify a statement. *Id.*
6. APPEAL TO THE SUPREME COURT OF THE UNITED STATES.—An appeal from the Supreme Court of this State to the Supreme Court of the United States is taken within ten days "after rendering the judgment" within the meaning of these terms as used in the act of Congress, and operates as a supersedeas, if the writ of error is sued out and lodged with the Clerk, and the proper security given, within ten days from the time a petition for rehearing is denied. *Magraw* v. *McGlynn*, 257.
7. APPEALABLE ORDER.—An appeal does not lie from an order striking out a statement on motion for a new trial. *Quivey* v. *Gambert*, 304.
8. APPEALABLE ORDER.—If the plaintiff dismisses the action before trial, and the Court, on defendant's motion, makes an order restoring the cause to the calendar for trial, no appeal lies from this order. *Dimick* v. *Deringer*, 488.
9. UNDERTAKING ON APPEAL.—No undertaking on appeal is necessary when the appeal is taken by a county. *Warden* v. *Mendocino County*, 655.

See SUPREME COURT, 1; PRACTICE, 13, 14, 15; MUNICIPAL CORPORATIONS, 7.

APPEAL BOND.

1. SURETIES ON APPEAL BOND.—A party who excepts to the sufficiency of sureties on an appeal bond may waive their justification. *Blair* v. *Hamilton*, 49.
2. WAIVER OF JUSTIFICATION OF SURETIES.—If the sureties on an appeal bond are excepted to and appear before the Justice to justify, and the party excepting then states before the Justice that he knows the sureties to be good, and only excepted because his attorney told him to do so, this is a waiver of justification. *Id.*

ASSIGNABLE DEMAND.

1. DAMAGES CAUSED BY TRESPASS ASSIGNABLE.—A claim for damages caused by a trespass on land is assignable, and the assignee may maintain an action to recover the same. *More* v. *Massini*, 590.

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ASSESSMENT.

See TAXES, 5, 6, 7, 8, 16, 17, 18, 19, 20; MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10; CONDEMNATION OF LAND, 1.

ASSIGNMENT.

See ASSIGNABLE DEMAND, 1.

ATTACHMENT.

1. ATTACHMENT.—The vendor of real estate cannot take out an attachment for unpaid purchase money, if he can enforce a lien for such purchase money. It matters not whether such lien is one which Courts of equity will enforce in favor of a vendor, or whether it is one created by contract. *Hill* v. *Grigsby*, 55.
2. WHEN ATTACHMENT CANNOT ISSUE.—An attachment cannot issue when the plaintiff has a lien to secure his debt, and it matters not whether the lien is one recognized by Courts of equity or is one of statutory origin and resting in contract. *Id.*
3. IDEM.—If the plaintiff has a lien to secure his debt on property out of this State, an attachment cannot issue. *Id.*

See PROMISSORY NOTE, 9.

ATTORNEY IN FACT.

1. RATIFICATION OF ACT OF ATTORNEY IN FACT.—If the Court finds as a fact that one person executed a written instrument for another as his attorney in fact, without any power to do so, but that the constituent afterwards expressly ratified the act, the presumption will be that the ratification was in some legal and sufficient mode. *Racouillat* v. *Sansevain*, 377.

See MARRIED WOMEN, 3; POWER OF ATTORNEY, 1, 2, 3.

BAR.

See CRIMINAL LAW, 29; PENDENCY OF ANOTHER ACTION, 1.

BILL OF PARTICULARS.

1. BILL OF PARTICULARS.—If a bill of particulars is too general, the party receiving it should obtain an order for further particulars of the account. If he does not, he cannot proceed as if no bill of particulars was rendered. *Providence Tool Company* v. *Prader*, 634.

See DEFAULT, 2.

BILL OF EXCEPTIONS.

See NEW TRIAL, 15.

BITE OF A DOG.

See DAMAGES, 1.

BOND.

1. BOND OF INDEMNITY TO SHERIFF.—If in a bond to indemnify a Sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought

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against him, the Sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. *Lott* v. *Mitchell*, 23.

2. Approval of Official Bond.—The official bond of a County Treasurer is not invalidated because approved by the County Judge instead of the Board of Supervisors. *Mendocino Co.* v. *Morris*, 145.

See Judgment, 1, 7; Pleadings, 6, 7, 8, 26, 27, 28; Parties-to-Actions, 2; Appeal, 9.

BOARD OF EQUALIZATION.

See Certiorari, 3, 4; Practice, 17.

BOUNDARY LINES.

See Deed, 1, 3, 5, 6.

BURGLARY.

See Criminal Law, 1, 2.

CASE AFFIRMED.

Teschemacher v. Thompson, 18 Cal. 11, in Ward v. Mulford, 365.

CASES CITED AS AUTHORITY.

Aliens.—Ramirez v. Kent, 2 Cal. 560, People v. Folsom, 5 Cal. 378, and Merle v. Mathews, 26 Cal. 477, in Racouillat v. Sansevain, 376.

Appeal.—Leffingwell v. Griffing, 29 Cal. 193, and Ketchum v. Crippen, 31 Cal. 365, in Genella v. Relyea, 151.

Appealable Orders.—Ketchum v. Crippen, 31 Cal. 365, Leffingwell v. Griffing, 29 Cal. 193, Peck v. Courtis, 31 Cal. 207, and Genella v. Relyea, *ante* 151, in Pendegast v. Knox, 73. Leffingwell v. Griffing, 29 Cal. 193, Ketchum v. Crippen, 31 Cal. 365, Pendegast v. Knox, *ante* 73, and Genella v. Relyea, *ante* 151, in Quivey v. Gambert, 304.

Assignment of Damages for a Trespass.—Lazard v. Wheeler, 22 Cal. 142, Brown v. Scott, 25 Cal. 194, and Humphreys v. McCall, 9 Cal. 59, in Vassault v. Austin et als. 597.

Attorney in Fact.—Haskell v. Cornish, 13 Cal. 45, and McDonald v. Bear River and Auburn W. and M. Co., 13 Cal. 221, in Love v. Sierra Nevada L. W. and M. Co., 639.

Bonds.—Wilson v. McEvoy, 25 Cal. 169, and Prader v. Grimm, 28 Cal. 11, in Lott v. Mitchell, 23.

Boundary Lines.—Hicks v. Coleman, 25 Cal. 143, in Fratt v. Woodward, 219.

Certiorari.—Whitney v. Board of Delegates, 14 Cal. 479, and Lowe v. Alexander, 15 Cal. 300, in Blair v. Hamilton, 49.

Commissioners of Sinking Fund of San Francisco.—Smith v. Morse, 2 Cal. 524, Heydenfeldt v. Hitchcock, 15 Cal. 514, and The People ex rel. v. The Broadway Wharf Company, 31 Cal. 33, in Ellis v. Eastman, 447.

Conflict of Laws.—Morris v. Harris, 15 Cal. 226, and Hickman v. Alpaugh, 21 Cal. 225, in Hill v. Grigsby, 55.

Criminal Law.—People v. Shotwell, 27 Cal. 401, and People v. Garnett, 29 Cal. 626, in The People v. Jim Ti, 60. People v. Parsons, 6 Cal. 487, 7 Cal. 403, 10 Cal. 309, 14 Cal. 30, People v. Garnett, 25 Cal. 533, People v. King, 27 Cal. 510, in The People v. Shaber, 36. People v. Strong, 30 Cal. 151, in People v. Lachanais, 433.

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People v. Levison, 16 Cal. 98, People v. King, 27 Cal. 514, and People v. Barry, 31 Cal. 357, in People v. Dick, 213. Boyce v. The California Stage Co., 25 Cal. 460, and People v. Dodge, 30 Cal. 448, in The People v. Williams, 280.

Criminal Practice.—People v. Thompson, 28 Cal. 218, People v. Honshell, 10 Cal. 86, People v. Stonecifer, 6 Cal. 411, in The People v. Martin, 91.

Deeds.—Echols v. Chenery, 28 Cal. 159, in Love v. Sierra Nevada L. W. and M. Co., 639.

Default.—Wilson v. Cleaveland, 30 Cal. 198, Kelly v. Van Austin, 17 Cal. 565, Wallace v. Eldridge, 27 Cal. 497, Glidden v. Packard, 28 Cal. 651, and Bond v. Pacheco, 30 Cal, 533, in Providence Tool Co. v. Prader, 634.

Easement.—Wood v. Truckee Turnpike Co., 24 Cal. 474, in Pico v. Colimas, 573.

Ejectment.—Estrada v. Murphy, 19 Cal. 272, Clark v. Lockwood, 21 Cal. 222, and Emeric v. Penniman, 26 Cal. 119, in O'Connell v. Dougherty, 458. Garrison v. Sampson, 15 Cal. 93, Coryell v. Cain, 16 Cal. 573, Hestres v. Clements, 21 Cal. 425, Hutton v. Schumaker, Id. 453, and Baldwin v. Simpson, 12 Cal. 560, in Polack v. McGrath, 15. Yount v. Howell, 14 Cal. 465, Calderwood v. Brooks, 28 Cal. 151, Vance v. Olinger, 27 Cal. 358, Wattson v. Dowling, 26 Cal. 125, in Marshall v. Shafter, 176. Hawkins v. Reichert, 28 Cal. 536, in Dimick v. Deringer, 488.

Equity.—Beatty v. Clark, 20 Cal. 12, Bodley v. Ferguson, 30 Cal. 511, Daggett v. Rankin, 31 Cal. 322, and Racouillat v. Sansevain, *ante* 376, in Love v. Sierra Nevada L. W. and M. Co., 639.

Equitable Title.—Seale v. Ford, 29 Cal. 106, Salmon v. Symonds, 30 Cal. 301, Estrada v. Murphy, 19 Cal. 272, Clark v. Lockwood, 21 Cal. 222, and Emeric v. Penniman, 26 Cal. 119, in O'Connell v. Dougherty, 458.

Estoppel by Judgment.—Caperton v. Schmidt, 26 Cal. 479, Gray v. Dougherty, 25 Cal. 266, Garwood v. Garwood, 29 Cal. 514, Hamm v. Arnold, 23 Cal. 373, and Hagar v. Schindler, 29 Cal. 57, in Marshall v. Shafter, 176.

Gold Coin Judgment.—Emery v. San Francisco Gas Co., 28 Cal. 345, Emery v. Bradford, 29 Cal. 75, and Hendricks v. Crowley, 31 Cal. 471, in Beaudry v. Valdez, 269.

Habeas Corpus.—In the Matter of Edward Ring, 28 Cal. 247, in the Matter of Brown, 48.

Homestead.—Elias v. Verdugo, 27 Cal. 418, Wolf v. Fleischacker, 5 Cal. 244, Reynolds v. Pixley, 6 Cal. 167, Giblin v. Jordan, 6 Cal. 117, and Kellersberger v. Copp, 6 Cal. 565, in Seaton v. Son, 481.

Indemnifying Bond.—Wilson v. McEvoy, 25 Cal. 69, and Prader v. Grimm, 28 Cal. 11, in Lott v. Mitchell, 23.

Injunction.—Merced Mining Company v. Fremont, 7 Cal. 322, Hicks v. Michael, 15 Cal. 116, Leach v. Day, 27 Cal. 646, People v. Morrill, 26 Cal. 360, and Natoma Water and Mining Co. v. Clarkin, 14 Cal. 551, in More v. Massini, 590.

Insolvent Debtors.—Brewster v. Ludekins, 19 Cal. 170, in Wilson v. His Creditors, 406.

Judgments.—Guy v. Franklin, 5 Cal. 416, Emeric v. Tams, 6 Cal. 155, McCann v. Lewis, 9 Cal. 247, Mount v. Chapman, 9 Cal. 297, and Lane v. Gluckauf, 28 Cal. 294, in Corcoran v. Doll, 82. Casement v. Ringgold, 23 Cal. 137, in Genella v. Relyea, 159.

Law of a Case.—Kile v. Tubbs, 23 Cal. 431, in Kile v. Tubbs, 332.

Legal Title.—Seale v. Ford, 29 Cal. 106, in O'Connell v. Dougherty, 458.

Limitation of Actions.—Hagar v. Schindler, 29 Cal. 60, in Stewart v. Thomson, 260. The Union Water Co. v. Crary, 25 Cal. 509, in Davis v. Gale, 26.

Digitized by Google

Married Women.—Maclay *v.* Love, 25 Cal. 379, Ingoldsby *v.* Juan, 12 Cal. 564, and Bodley *v.* Ferguson, 30 Cal. 511, in Racouillat *v.* Sansevain, 376.

Marsh Lands.—People *v.* Morrill, 26 Cal. 352, in Rondell *v.* Fay, 354.

Mexican Grants of Land.—Treadway *v.* Semple, 28 Cal. 652, in Semple *v.* Wright, 659.

Month.—Sprague *v.* Norway, 31 Cal. 173, in Savings and Loan Society *v.* Thompson, 347.

Mortgage.—Hidden *v.* Jordan, 28 Cal. 301, in Hidden *v.* Jordan, 397.

Municipal Corporations.—Emery *v.* San Francisco Gas Company, 28 Cal. 379, McCauley *v.* Brooks, 16 Cal. 11, Emery *v.* Bradford, 29 Cal. 75, and Taylor *v.* Palmer, 31 Cal. 240, in Beaudry *v.* Valdez, 269.

New Trial.—Patterson *v.* Ely, 19 Cal. 35, Taylor *v.* California Stage Co., 6 Cal. 228, and Schellhous *v.* Ball, 29 Cal. 605, in Brooks *v.* Douglass, 209. Lyle *v.* Rollin, 25 Cal. 440, Ellis *v.* Jeans, 26 Cal. 273, Doe *v.* Vallejo, 29 Cal. 390, and Rice *v.* Cunningham, 29 Cal. 495, in Appeal of Piper, 530.

Patent.—Doll *v.* Meador, 16 Cal. 297, Terry *v.* Megerle, 24 Cal. 624, People *v.* Stratton, 25 Cal. 251, in Rondell *v.* Fay et al. 354. Bonds *v.* Hickman 29 Cal. 461, in Bonds *v.* Hickman, 202.

Pleadings.—Stoddard *v.* Treadwell, 26 Cal. 303, in Love *v.* Sierra Nevada L. W. and M. Co. 639. Green *v.* Palmer, 15 Cal. 411, Coryell *v.* Cain, 16 Cal. 567, Willson *v.* Cleveland, 30 Cal. 192, and Larco *v.* Casaneuava, Id. 561, in Racouillat *v.* Rene, 450. Nevada County and Sacramento Canal Co. *v.* Kidd, 28 Cal. 683, in Marshall *v.* Shafter, 176. Freeborn *v.* Glasier, 10 Cal. 338, DeWitt *v.* Petter, 13 Cal. 171, Higgins *v.* Horrell, 18 Cal. 333, and Wilkins *v.* Stidger, 22 Cal. 235, in Abadie *v.* Carillo, 172.

Plea of Pendency of another Action.—O'Connor *v.* Blake, 29 Cal. 312, in Ayres *v.* Bensley, 620.

Possession of Land.—Hicks *v.* Coleman, 25 Cal. 122, in Ayres *v.* Bensley, 620.

Proof of Incorporation.—People *v.* Hughes, 29 Cal. 257, in The People *v.* Schwartz, 160.

Street Assessments in San Francisco.—Smith *v.* Davis, 30 Cal. 536, People *v.* Sneath, 28 Cal. 615, Moss *v.* Shear, 25 Cal. 46, Kelsey *v.* Abbott, 13 Cal. 619, and Taylor *v.* Donner, 31 Cal, 480, in Blatner *v.* Davis, 328.

Taxes.—O'Grady *v.* Barnhisel, 23 Cal. 287, Brunn *v.* Murphy, 29 Cal. 326, and People *v.* Holladay, 25 Cal. 300, in Wetherbee *v.* Dunn, 106.

Taxes for Street Improvements in San Francisco.—Emery *v.* San Francisco Gas Company, 28 Cal. 345, Emery *v.* Bradford, 29 Cal. 75, and Conlin *v.* Seaman, 22 Cal. 549, in Nolan *v.* Reese, 484. Emery *v.* San Francisco Gas Company, 28 Cal. 372, in Appeal of Piper, 530.

Tide Lands.—People *v.* Morrill, 26 Cal. 336, and People *v.* Davidson, 30 Cal. 379, in Rondell *v.* Fay, 354.

Trespass.—Carpentier *v.* Mendenhall, 28 Cal. 484, in Pico *v.* Colimas, 578.

Van Ness Ordinance.—Wolf *v.* Baldwin, 19 Cal. 306, and Davis *v.* Perley, 30 Cal. 630, in Polack *v.* McGrath, 15.

Vendor's Lien.—Hess *v.* Sparks, 15 Cal. 192, Salmon *v.* Hoffman, 2 Cal. 138, Truebody *v.* Jacobson, 2 Cal. 286, Goulden *v.* Buckalew, 4 Cal. 111, Ellis *v.* Jeans, 7 Cal. 415, Taylor *v.* McKinney, 20 Cal. 618, Baum *v.* Grigsby, 21 Cal. 177, and Willis *v.* Wozencraft, 22 Cal. 607, in Hill *v.* Grigsby, 55.

Water Rights.—Maeris *v.* Bicknell, 7 Cal. 261, and The Union Water Co. *v.* Crary, 25 Cal. 509, in Davis *v.* Gale, 26.

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CASES COMMENTED ON.

Curran *v.* Shattuck, 24 Cal. 430, in Sherman *v.* Buick, 241.
Thompson *v.* Smith, 28 Cal. 527, in Valencia *v.* Couch, 339.
Mulford *v.* Estudillo, 23 Cal. 98, in Mulford *v.* Estudillo, 131.
People *v.* Hughes, 29 Cal. 257, in People *v.* Schwartz, 160.
Bennett *v.* His Creditors, 22 Cal. 42, and Grow *v.* His Creditors, 31 Cal. 328, in Wilson *v.* His Creditors, 406.
Plume *v.* Seward, 4 Cal. 94, in Polack *v.* McGrath, 15.
Harper *v.* Minor, 27 Cal. 107, and Jenkins *v.* Frink, 27 Cal. 337, in Quivey *v.* Gambert, 304.
Oliver *v.* Walsh, 6 Cal. 456, Gates *v.* Kieff, 7 Cal. 125, Natoma Water and Mining Co. *v.* Clarkin, 14 Cal. 554, and Gray *v.* Dougherty, 25 Cal. 266, in More *v.* Massini, 590.

CASES NOT REPORTED.

Ogilvie *v.* Barry—judgment affirmed.
People *v.* Setterman—judgment affirmed.
Damon *v.* Pardon—judgment affirmed.
Wood *v.* Bonnett—judgment affirmed.
Le Roy *v.* Rassette—judgment affirmed.
Hendrick *v.* Hitchcock—judgment affirmed.
People *v.* Renguel—judgment affirmed.
Abel Guy's Appeal in the matter of widening Kearny street—judgment affirmed.
People *v.* Van Riper—judgment affirmed.
People *v.* Card—judgment affirmed.
People *v.* Sorano—judgment affirmed.

CERTIORARI.

1. RETURN OF FACTS ON CERTIORARI.—When a case is brought from an inferior Court or tribunal to the Supreme Court by certiorari, if all the facts upon which the Court below acted are not in the record, the Supreme Court may require the Court below to certify such facts. *Blair* v. *Hamilton*, 49.

2. IDEM.—The return of a finding of facts made by a County Judge to a writ of certiorari, constitutes a part of the record within the meaning of the four hundred and sixty-third section of the Practice Act, though the finding is not made until the next term after the testimony is taken and the order or judgment based on it is made. *Id.*

3. RETURN TO WRIT OF CERTIORARI.—A Clerk of the Board for the Equalization of Taxes, in answer to a writ of certiorari requiring the Board to certify the proceedings had before them in relation to equalizing the value of property, can return only a transcript of such documents, orders, etc., as remain of record or on file in his office. It is not made the Clerk's duty to take down or preserve the evidence. *C. P. R. R. Co.* v. *Placer Co.*, 582.

4. IDEM.—If the Board for the Equalization of Taxes do not take down and preserve the evidence in a matter of equalization of a tax, and have the same filed with their Clerk, the evidence cannot be certified by the Clerk in his return to a writ of certiorari. *Id.*

CHARGE TO A JURY.

See INSTRUCTIONS TO A JURY.

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COMMISSIONERS.

See WITNESS, 2; TAXES, 14, 15, 16.

COMMISSIONERS OF SINKING FUND OF SAN FRANCISCO.

See SAN FRANCISCO, 1.

COMMON PROPERTY.

1. SEPARATE AND COMMON PROPERTY.—If a decree of divorce directs an equal division of land, the common property, and a sale of the same, and that if either party purchase at the sale, his or her receipt be taken for the amount his or her due, and the former wife marries again before the sale, and becomes the purchaser, and pays a portion of the money required out of community money, that undivided proportion of the land will be common property which the community money bore to the whole price bid, and the other undivided part will be the wife's separate property. *Ewald* v. *Corbett*, 493.

See CONTRACT, 1, 2; DEED, 9.

CONDEMNATION OF LAND.

1. CONTESTED TITLE TO LOT IN WIDENING KEARNY STREET.—The determination of the Commissioners, in the matter of widening Kearny street in San Francisco, as to who is the owner of a lot, or a building thereon, and entitled to the money to be paid for damages estimated, is not conclusive; but where the right to the money is contested, the Board of Supervisors should pay the amount into the office of the County Clerk, and leave the contest between the claimants to be settled by the Courts in pursuance of the provisions of the statute. *Appeal of Lefevre*, 565.

See ROADS AND HIGHWAYS, 3; TAXES, 14, 15, 16, 17, 18, 19, 20; WITNESS, 2.

CONFESSIONS.

See CRIMINAL LAW, 7, 8; EVIDENCE, 5.

CONFIRMATION.

1. CONFIRMATION.—A confirmation is a contract by which an act that was voidable is made firm and unavoidable. *Barr* v. *Schroeder*, 609.

See DEED, 14.

CONFLICT OF LAWS.

See LAWS OF ANOTHER STATE, 1.

CONSIDERATION.

See CONTRACTS, 1, 2.

CONSTITUTIONAL LAW.

1. CONSTITUTIONALITY OF LAWS.—In passing on the constitutionality of a law, it is the duty of Courts to look to the true object of the law, and to trace out its true result, and not to be guided by those objects or results which the Legislature may have mistakenly declared; and if the law be found to be consistent with the Constitution, or within the acknowledged power of the Legislature, to uphold it. *Sherman* v. *Buick*, 241.

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2. CONSTITUTIONALITY OF ACT FOR WIDENING STREETS.—The act of April 4th, 1864, giving power to the Board of Supervisors of San Francisco to widen streets, etc., does not prescribe a rule for the apportionment of the expenses of the improvement for the owners of lots deemed benefited different from that prescribed for railroad corporations benefited, and it is not, therefore, in this respect unconstitutional. *Appeal of N. B. and M. R. R. Co.*, 499.

3. IDEM.—Said rule for the apportionment of expenses is, in both cases, according to the ratio of benefits received. *Id.*

See JURY, 5; ROADS AND HIGHWAYS, 1, 2, 3, 4, 5; TAXES, 13, 19, 20.

CONTINUANCE.

1. CONTINUANCE.—It is not an abuse of discretion for the Court to refuse a continuance on account of the voluntary absence of the defendant on important business at the time the case has been set for trial, when it does not appear that the business could not have been delayed, nor could not have been attended to by some one else, nor that the facts were not in the possession of his attorney. *Wilkinson* v. *Parrott*, 102.

CONTRACTS.

1. SALE OF CHILDREN'S INTEREST IN THE COMMON PROPERTY TO THEIR FATHER.—If children, upon the death of their mother, inherit one half the common property, a sale by them of this interest to the father, even by an instrument which creates a right in his favor against them which he can only enforce in equity, is a sufficient consideration to support a promise by him to pay them for the same. *Racouillat* v. *Sansevain*, 376.

2. AGREEMENT BETWEEN CHILDREN AND FATHER.—A claim set up by children to a part of the common property upon the death of their mother, who was a non-resident alien, is a sufficient consideration to render valid an agreement of compromise with their father, by which they convey to him and he promises to pay them a consideration therefor. *Id.*

3. CONSTRUCTION OF CONTRACT.—The object to be attained in the construction of a contract is to ascertain from its language, if possible, the intention of the parties. *Id.*

4. CONSTRUCTION OF CONTRACT FOR PARTITION OF LAND.—A contract between A. and B., tenants in common in a tract of land, by which it is agreed that B.'s interest in the land shall be a certain amount in excess of what he otherwise owned, and that B. shall extinguish all claim of title in the land set up by C. by procuring C.'s deed, (C. then asserting an interest in the land claimed by A.,) and that after certain other events transpire, a division of the land shall take place between the contracting parties, according to the contract, and deeds be exchanged, is not fulfilled by B. by having procured C.'s deed *before* the contract was made, nor by procuring C.'s deed to himself, unless he then conveys to A. *Porter* v. *Atherton*, 416.

5. IDEM.—The fact that C. had no valid title to any of the land does not excuse B. from procuring a conveyance from him to A. after the contract was made, before B. can go into equity to enforce a specific performance. *Id.*

6. FRAUD IN CONTRACTOR TO IMPROVE STREETS IN SAN FRANCISCO.—If the person who contracts with the Street Superintendent in San Francisco to improve a street, before the contract is made, makes a private contract with a part of the owners of the lots liable to be assessed for the improvement to do their work for less than the price allowed by the contract, this private contract is in fraud of

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the law under which the streets are improved; but the fraud is no defence in an action by the contractor to recover the assessment, and must be taken advantage of by a remonstrance to or appeal to the Board of Supervisors. *Nolan* v. *Reese*, 484.

See DEED, 1, 3, 5, 6; MARRIED WOMEN, 1; MUNICIPAL CORPORATIONS, 11.

CONTRACT FOR MORTGAGE.

See MORTGAGE, 18.

CONVEYANCES.

See CONTRACTS, 1, 2, 4, 5; MORTGAGE, 4, 5, 6, 7.

CORPORATION.

1. EVIDENCE OF INCORPORATION.—Testimony tending to show that a company is a corporation *de facto*, dispenses with strict proof of the corporate character, and precludes the party offering it from afterwards disputing the company's right to act as a corporation. *Rondell* v. *Fay*, 354.

2. TESTIMONY AS TO CORPORATE CHARACTER.—If the plaintiff, in his opening, introduces testimony tending to show that a company is a corporation *de facto*, he cannot object to defendant's testimony as to the strict corporate character of the company. *Id.*

3. RIGHT TO ACT AS CORPORATION.—An inquiry as to the right of a company to act as a corporation, can only be had at the suit of the State on information by the Attorney-General. *Id.*

See CRIMINAL LAW, 15; MORTGAGE, 13, 14.

COUNTIES.

1. CREATING NEW COUNTY.—When a law is passed providing for the creation of a new county out of parts of counties already existing, which act provides for the future election of county officers, and fixes a time after their election when they shall enter upon the discharge of their duties, the territory described does not become a county until its organization is perfected by the election of its officers. *People* v. *McGuire*, 140.

2. IDEM.—To constitute a county, something more is required than a law defining its boundaries. A local government must be provided. *Id.*

COUNTY COURT.

See CERTIORARI, 2; JUSTICE OF THE PEACE, 1, 2; JURISDICTION, 1.

COUNTY TREASURER.

See PLEADINGS, 8.

COURTS.

See JUDICIAL NOTICE, 1.

COVENANTS.

See MORTGAGE, 7, 11.

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CRIMINAL LAW.

1. INDICTMENT FOR BURGLARIOUSLY BREAKING INTO HOUSE.—An indictment for burglariously breaking and entering a house in the nighttime, with intent to commit larceny, is good if it charge the breaking and entering with intent to commit larceny, without charging whose goods the defendant intended to steal, or that there were any goods in the house which the defendant could steal. *People* v. *Shaber*, 36.

2. CRIME OF BURGLARIOUSLY ENTERING HOUSE.—The crime of burglariously breaking and entering a house with intent to commit a larceny, is complete if the fact is found that the defendant broke into and entered for that purpose, even if there are no goods in the house of which a larceny could be committed. *Id.*

3. COMMITMENT TO PRISON.—No other authority or warrant for the detention of a prisoner is required than a certified copy of the judgment rendered against him. *In the Matter of Brown*, 48.

4. SENTENCE ON PLEA OF GUILTY OF MURDER.—If a defendant pleads guilty to an indictment for murder which does not specify the degree, and the Court imposes a sentence of confinement in the State Prison, the judgment is not a nullity, for the presumption is that the Court by testimony ascertained the degree of the crime. *Id.*

5. INDICTMENT FOR LARCENY.—If an indictment for stealing money fails to describe the money with sufficient particularity, the objection should be taken by demurrer, and if not so taken is waived. *People* v. *Jim Ti*, 60.

6. LARCENY FROM SERVANT.—If property is stolen while an employé of the owner has charge of it, and another person is charged with the larceny, the prosecution are not bound, on his trial, to call as a witness such employé. *Id.*

7. CONFESSION OF CRIME.—Confessions which are entirely voluntary when made, are admissible in evidence, even if, on a prior occasion, some promise of favor not acted upon, and which had ceased to be operative, had been made to induce the accused to confess. *Id.*

8. CONFESSIONS IN EVIDENCE.—The question as to the admissibility of confessions is one for the exercise of a sound judicial discretion, to be guided by the circumstances of each particular case. *Id.*

9. MONEY STOLEN.—On a trial for a larceny of gold and silver coin, the identity of the money stolen with that found on the defendant is a question of fact for the jury. *Id.*

10. NAME IN INDICTMENT.—If a defendant is indicted by a wrong name, and so states when asked, and gives his true name, the true name may be substituted, and subsequent proceedings had in the true name. *Id.*

11. INDICTMENT.—An indictment which charges but one offence, and that in the language of the statute, is sufficient. *People* v. *Martin*, 91.

12. ACCESSORY TO CRIME.—Where a party is proceeded against as an accessory to a crime, it is better to indict him as an accessory than as a principal. *People* v. *Schwartz*, 160.

13. INDICTMENT OF ACCESSORY.—When one is indicted as an accessory to a crime, the acts of the defendant should be stated as fully in the indictment as they are in the statute. *Id.*

14. INDICTMENT FOR BURNING A BUILDING INSURED.—An indictment for burning a building insured against fire, with intent to defraud an insurance company, should aver that the company is a corporation, if such be the fact, or that it is a partnership composed of certain individuals, naming them, if such be the fact,

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and that the act was done with intent to injure and defraud them in their associate capacity. *Id.*

15. IDEM.—A mere averment of a company name in an indictment for burning an insured building with intent to defraud, amounts, in a legal sense, to an entire absence of any averment as to the party intended to be injured. *Id.*

16. PROOF OF INCORPORATION.—If the indictment avers that the company is a corporation, proof of the existence of the corporation *de facto* will support the averment. *Id.*

17. REVIEW OF INSTRUCTIONS GIVEN BY COURT BELOW.—If the defendant in a criminal case seeks a reversal of the judgment on the ground of error in giving or refusing instructions, the record must contain sufficient of the facts of the case to show the pertinency of the instructions given or refused, or the appellate Court will not review the action of the Court below. *People* v. *Dick*, 213.

18. IDEM.—If the Court in its instructions assumes a certain state of facts as proved, which show the applicability of instructions given or refused, the appellate Court may review the action of the Court in giving or refusing them, without any of the evidence being embodied in the record. *Id.*

19. IDEM.—If the action of the Court below in giving or refusing instructions is erroneous under any possible state of facts, the appellate Court will review it, notwithstanding the evidence is not in the record. *Id.*

20. CONVICTION ON CIRCUMSTANTIAL TESTIMONY.—In order to convict a defendant of a crime upon circumstantial testimony alone, the circumstances proved must all concur to show that he committed the crime, and must all be inconsistent with any other rational conclusion, and must exclude to a moral certainty every other hypothesis but the single one of guilt. *Id.*

21. CHARGE OF COURT AS TO FACTS.—It is better for the Court in charging the jury in a criminal case, to avoid assuming any material fact as proved, however clear to the mind of the Court such fact may seem to be established. *Id.*

22. INSTRUCTIONS TO JURY.—Strong expressions, and a manifest attempt at coloring favorable to the defendant, in instructions asked by his counsel, in a criminal case, which state the law correctly, may not be regarded as constituting substantial reasons for refusing the instructions. *People* v. *Williams*, 280.

23. GIVING AND REFUSING INSTRUCTIONS.—It is better to give an instruction in a criminal case, which in the main states the law correctly, with modifications if required, than to refuse it, although no error may be committed in refusing it. *Id.*

24. INSTRUCTIONS SHOULD APPLY TO FACTS.—It is not error for the Court to refuse an instruction, in a criminal case, which is not pertinent to the facts of the case. *Id.*

25. INSTRUCTIONS AS TO REASONABLE DOUBT.—If, on a trial for murder, the fact of the killing is admitted, and the defence rests on the question of the grade of the offence, or whether the defendant was justified in killing on the ground of self-defence, instructions on his behalf on the question of reasonable doubt, framed so broad as to include the fact of killing, are not pertinent, and should be refused. *Id.*

26. IDEM.—Instructions in such a case, upon the question of reasonable doubt, should apply only to the grade of the offence and the fact of justification. *Id.*

27. JUSTIFICATION IN KILLING.—On a trial for murder the Court should not instruct the jury that the defendant was justified if he was in danger of being killed by the deceased and understood and feared such danger; but that he was justified if the circumstances were such as to excite the fears of a reasonable being, and that he acted under the influence of such fears, and not in a spirit of revenge. *Id*

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28. INSTRUCTIONS AS TO VENUE OF CRIME.—
as to the venue of the crime for which the
the subject are out of place. *Id.*

29. REPELLING ASSAULT.—In repelling an as
more force than is absolutely necessary.

30. FORMER CONVICTION, PLEA OF.—If a defer
pleads guilty, and his plea is entered of r
the crime without a trial, and this convic
former conviction if he is again indicted f
ment was pronounced by the Court upon t
432.

31. RATIONAL DOUBT.—When the testimony o
stantial, and there is nothing which con
homicide, the defendant, if he desires it, i
as to what the law means by a rational dou

32. INSTRUCTIONS IN CRIMINAL CASE.—The b
refuse an instruction asked on behalf of a
there is no valid objection, although the
structed on the point. A District Attorne
tions. *Id.*

See EVIDENCE, 3, 4, 5, 6, 10, 11; CRIMINAL PRA
COURT, 2

CRIMINAL PR

1. TRANSCRIPT ON APPEAL IN CRIMINAL CASE
the action of the Court below in a crimina
of exceptions, or a correct statement of
signed and settled by the Judge. *People*

2. IDEM.—A bill of exceptions signed and se
Clerk below, is the correct mode of maki
appeal. *Id.*

3. EXCUSING GRAND JURORS.—The Judge exc
and in attendance, without requiring th
under oath in open Court: *Held*, no error.

4. OBJECTION TO GRAND JURY.—If a defend
nity given him to interpose a challenge t
of such jury, before the indictment is fou
afterwards take advantage of any objection
juror. *Id.*

See GRAND JURY, 1, 2; CRIM

CROSS-EXAMI

See WITNES

DAMAGE

1. DAMAGES FROM BITE OF DOG.—It is not n
tained by the bite of a dog, for the plaintif
dog. It is sufficient on this point for the pl
the dog. *Wilkinson* v. *Parrott*, 102.

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10. DEED OF TRUST.—It is not necessary tha conveys to the grantee, in trust to sell th to a third person out of the proceeds, executed by the *cestui que trust*, or tha grantor to the *cestui que trust*, in order, pass the legal title to the grantee. *Barr*

11. IDEM.—The above rule does not impair question the *bona fides* of the deed. *Id.*

12. DEED TO FICTITIOUS PERSON.—A deed to in existence, does not transfer the title of

13. DELIVERY OF DEED.—The recording of a the grantor to the grantee, unless the dee or some one claiming through or under h

14. IDEM.—Without the delivery of a deed, it

15. CONFIRMATION OF VOID DEED.—A deed th through mistake in reciting the name of subsequent deed given for that purpose.

16. SURPLUS IN DEED DOES NOT VITIATE IT.— to confirm a former one in which mistake void, rendering confirmation impossible, regarded as surplus, and it will be sufficie

See TAX DEED, 1; I

DEFAUL

1. ENTRY OF DEFAULT BY CLERK.—The Cle default, without an order of Court, from th it must appear that all the facts existed w *Providence Tool Company* v. *Prader*, 634

2. IDEM.—When the defendant demands a bi for leave to answer within ten days after which does not contain the items of accou judgment if the defendant fails to answer

See EJECTMEN

DEMURRI

1. JUDGMENT ROLL.—Until the amendment t the Practice Act, the judgment roll was taining or overruling a demurrer. *Abadie*

2. APPEAL ON JUDGMENT ROLL.—If, prior to was filed, and a judgment by default was judgment roll, and the same did not di demurrer, the presumption was that the d necessary preliminary steps were taken to

See PLEADINGS, 1

DICTA.

See LAW OF A CA

DISTRICT ATT

See OFFICE,

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DISTRICT COURTS.

See JURISDICTION, 2; JUDGMENTS, 11.

DISMISSAL OF ACTION.

See PRACTICE, 16; EJECTMENT, 23.

DITCHES.

See WATER RIGHTS, 1, 2, 8, 10.

DIVORCE.

1. DIVORCE.—If the referee in an action for divorce finds the facts, the Court should disregard the finding, and determine the cause upon the evidence. *Benkert* v. *Benkert*, 467.

2. DIVORCE FOR DESERTION.—The word "wilful," in the phrase "wilful desertion by either party for the period of two years," used in the statute concerning divorces, signifies intentional. Said word does not imply malice. *Id.*

3. WHEN DESERTION IS PROVED.—Desertion by husband or wife is made out when it is shown that the absence commenced and has continued during two years, without the consent and against the objections of the other party. *Id.*

4. CONDONATION OF DESERTION.—If the desertion of husband or wife has continued for two years, the offer of the offending party to return and live and cohabit with the other will not defeat an action for a divorce, unless the offer is accepted and acted on. An offer to receive the offending party may be withdrawn. *Id.*

See COMMON PROPERTY, 1; ABATEMENT, 1.

DOG.

See DAMAGES, 1.

EASEMENT.

1. EASEMENT.—One who owns an easement upon the land of another has a right to enter on the land to keep the easement in repair, but aside from this and analagous purposes, he has no right of entry. *Pico* v. *Colimas*, 578.

See RAILROADS, 1.

EASTERLY.

See DEED, 2.

EJECTMENT.

1. VAN NESS ORDINANCE.—The inclosure of a lot in San Francisco by building a fence around it made of posts eight feet apart and five feet high, with two boards nailed on the same, without actual occupation or cultivation of the lot, did not give such possession of the same to the person inclosing as to pass the title to him under the Van Ness Ordinance. *Polack* v. *McGrath*, 15.

2. ADVERSE POSSESSION OF LAND.—One claiming to have acquired a title to land by five years adverse possession, need only show that his adverse possession was held by a substantial inclosure, and need not prove occupation, cultivation, or use of the premises. *Id.*

3. WHAT CONSTITUTES PRIOR POSSESSION OF LAND.—The plaintiff in ejectment who claims to recover on the ground of prior possession alone, without color of title,

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must show an *actual* prior possession; an
tected by a substantial inclosure, even i
this constitutes an *actual* possession. A
prudent farmer would erect to protect gr

4. PROOF OF PRIOR POSSESSION.—If the pla
session alone, without color of title, proo
fence made of posts eight feet apart, with
establish such prior possession. *Id.*

5. EVIDENCE IN EJECTMENT.—The defendan
denial in his answer, give in evidence titl

6. ANSWER IN EJECTMENT.—An allegation ir
ment, of title in himself, does not consti
to a general denial of title in the plaintiff.

7. COMPLAINT IN EJECTMENT.—An allegatio
plaintiff, on a day named, "was possess
"which said premises the said plaintiff cl
gation of title in the plaintiff to the prem

8. CONSTRUCTION OF PLEADINGS.—The rul
strongly construed against the pleader do
given (if it will reasonably bear a differen
Id.

9. FACTS IN ISSUE AND PROBATIVE FACTS.—T
fact, the fact in issue, upon which a rec
facts established by the plaintiff going to
facts, which, if disputed by the defendant

10. AVERMENT OF OUSTER IN COMPLAINT.—It
ment to aver an ouster by the defendant.
of the possession by the defendant is equi

11. WHAT IS TRIED IN EJECTMENT.—It is the
parties that is tried in ejectment, and this

12. JUDGMENT IN EJECTMENT.—The party who
the merits, is successful because his is the
upon title presumed from prior possession
upon the legal presumption of title until t
the plaintiff. *Id.*

13. ISSUE IN EJECTMENT AS TO TITLE.—If the
avers title in himself, and the defendant i
ive titles of the plaintiff and the defendan

14. WHEN JUDGMENT IN EJECTMENT IS AN ES
parties, or their right to the possession of t
and tried, in ejectment, and the plaintiff
judgment is an estoppel, and the defendan
action to recover the same premises, mu
than he had when the judgment was rend

15. IDEM.—The fact that a judgment in eject
title, but only that he recover the posse
from being an estoppel as to whatever ri
Id.

16. TESTIMONY IN EJECTMENT.—If the plaintif
that, as a redemptioner, he had redeemed
chase made at a judicial sale by the def

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sues him to recover the same premises, he cannot introduce testimony to show that the redemption was not in fact made, even if in the second trial the defendant introduce his redemption deed. *Id.*

17. EJECTMENT.—To entitle a plaintiff in ejectment to recover possession of the demanded premises, he must not only have a right of entry at the time of trial, but must have had it also when the suit was brought. If he did not have a right of entry when the suit was commenced, but has acquired it *pendente lite*, he cannot recover. *Kile* v. *Tubbs*, 332.

18. EJECTMENT.—Ejectment cannot be maintained on an equitable title. *O'Connell* v. *Dougherty*, 458.

19. EJECTMENT ON EQUITABLE TITLE.—If the confirmee of a Mexican grant holds the legal title acquired by the confirmation in trust for other persons, such persons cannot maintain ejectment for the land. *Id.*

20. OUSTER OF TENANT IN COMMON.—Taking actual possession of land under a deed which purports to convey the whole thereof, under a belief that it does convey the whole, when in fact it gives title to an undivided portion only, is not an ouster of the tenant in common who owns the other undivided part. *Seaton* v. *Son*, 481.

21. LEGAL AND EQUITABLE TITLE.—If the plaintiff in his complaint avers that he holds the legal title to land and does not set up an equitable title, he cannot on the trial rely on an equitable title. *Id.*

22. DISMISSAL OF ACTION AS TO ONE OF SEVERAL DEFENDANTS.—If one of several defendants in ejectment answers and the others make default, the plaintiff may, before trial, dismiss the action as to the defendant answering, and take judgment against the others. *Dimick* v. *Deringer*, 488.

23. DEFENDANT IN EJECTMENT.—When the demanded premises are in the possession of a tenant, the tenant is the proper party defendant in ejectment. The landlord is not a proper party defendant, and if made so, the Court will, on motion, order a nonsuit as to him. *Id.*

24. LANDLORD MAY DEFEND IN NAME OF TENANT.—If the tenant in possession is sued in ejectment, the landlord may, in cases in which his title is drawn in issue, be permitted to defend the action in the name of the tenant, but not in his own name. *Id.*

25. SETTING ASIDE DEFAULT.—If the tenant sued in ejectment has, by neglect or design, suffered a default, the landlord may, upon a proper showing and motion in the name of the tenant, have the default set aside. *Id.*

26. STAY OF PROCEEDINGS UNDER WRIT OF RESTITUTION.—If the tenant and landlord are jointly made defendants in ejectment, and the tenant suffers default, and the landlord answers in his own name, and the plaintiff dismisses the action as to the landlord and takes judgment against the tenant, the Court cannot, on motion of the landlord, order a stay of proceedings under a writ of restitution. *Id.*

27. EJECTMENT BETWEEN TENANTS IN COMMON.—If the plaintiff and defendant, at the commencement of a suit in ejectment, are tenants in common in the premises, the plaintiff cannot recover possession of the entire premises to the exclusion of the defendants, nor can he recover his undivided part without proof of an ouster. *Ewald* v. *Corbett*, 493.

28. DEFENDANT NEED NOT LITIGATE NEW MATTER.—A defendant in ejectment is bound to bring forward all matter of a strictly defensive character, or be precluded from again litigating the same; but he is not bound to set up or litigate new matter constituting a cause of action in his favor. *Ayres* v. *Bensley*, 620.

See EVIDENCE, 17; POSSESSION OF LAND, 1, 2.

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EQUITABLE M

See MORTGAGE, 12, 15; REFERENCE, 1

EQUITABLE

See TITLE, 3; EJE

EQUIT

1. ACTION TO QUIET TITLE.—Possession in p title; but if the possession exist it matters *derwood*, 109.
2. ACTION TO QUIET TITLE.—A judgment fo bar to subsequent litigation on the same

See MORTGAGE, 8, 9, 10, 12, 15; I

ERASU

See PROMISSORY

ESTOPP

1. ESTOPPEL BY JUDGMENT.—If in an action t tiff's title there is more than one defen against one, but the bill is dismissed as does not estop plaintiff as to the title, in a land afterwards brought by the defenda *Marshall* v. *Shafter*, 176.
2. CONFIRMATION OF GRANTS OVERLAPPING land, made to different persons, are confir other in part, and the owner of one becom to the confirmation and survey of the oth estopped from afterwards denying that th v. *Wright*, 659.

See EJECTMENT, 14, 15, 28; JUDGMENT, 9; E JUDICATA, 1, 2, 3, 4;

EVIDENC

1. MORTGAGE AS EVIDENCE.—If a mortgage o by name, and then gives the monument bounded on three sides, without naming there is an averment in the complaint stat plaint also gives the general name and the the mortgage, without naming the cardina in *hæc verba* in the complaint, it is admiss it, as against a subsequent mortgagee who the land described in the complaint. *Lieg*
2. PAROL EVIDENCE TO EXPLAIN MORTGAGE. the land generally by name, but does not s its several sides, and the complaint contai ments not given were, parol evidence may premises as set out in the complaint. *Id.*
3. EVIDENCE AS TO TIME CRIME WAS COMMIT for rape, charged to have been commit

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whom the prosecuting attorney expects to prove the crime, in answer to his question whether at that time the defendant made propositions to her, states acts of his not amounting to the offence charged, this does not prohibit him from proving by her the commission of the offence at a time other than that before referred to by the witness. *People* v. *Manahan*, 68.

4. Evidence on Trial for Robbery.—On the trial for an assault with intent to rob, evidence on behalf of the prosecution is not admissible for the purpose of showing that the defendant entered into an agreement to commit another robbery on a different occasion. *People* v. *Jones*, 80.

5. Confessions of Defendant.—If the prosecution prove the defendant's confessions of the crime with which he stands charged, circumstances may be shown corroborative of those confessions. *Id.*

6. Evidence in Criminal Case.—On the trial of a defendant charged with one crime, testimony is not admissible to show that he had been engaged in plans for the commission of other crimes. *Id.*

7. Proof of Signature to Note.—If the complaint contains a copy of the note sued on and is not verified, and the answer denies its execution, but is not sworn to, the note is admissible in evidence without proof of the genuineness of the signature. *Corcoran* v. *Doll*, 82.

8. Evidence of Circumstances to fix Time.—If a defendant, on trial on a charge of robbery, claims to have been at another place when the robbery was committed, and there is testimony tending to show that he was at such other place about that time, any circumstances which will tend to fix the time he was at such other place are admissible in evidence. *People* v. *McCrea*, 98.

9. Hearsay Testimony.—Statements of a person who has been robbed, made to a third party, as to the description of the person who robbed him, are hearsay, and not admissible in evidence on the part of defendant to show that he is not the person thus described. *Id.*

10. Acquiescence in Statements of Others.—Admissions and confessions of guilt may be implied from the acquiescence of the party to whom they are made in the statements of others made in his presence. It makes no difference that the statements which call for a reply are made by a party who is incompetent to testify. *Id.*

11. Idem.—Such statements are admitted in evidence, not as themselves evidence of the truth of the facts stated, but to show the conduct of the defendant under the circumstances. *Id.*

12. Deed as Evidence.—A tax deed properly acknowledged is admissible in evidence without further proof. *Wetherbee* v. *Dunn*, 106.

13. Testimony to Impeach Judgment.—Testimony cannot be introduced to show that a former judgment between the same parties upon the same subject-matter was erroneous. *Marshall* v. *Shafter*, 176.

14. Testimony on Trial for Arson.—On a trial for arson, charged to have been committed by burning a building owned by a person named and in which he was residing, if no question is made by the defendant as to the right of such person to the possession of the land on which the building stood, testimony as to its ownership is irrelevant. *People* v. *Scott*, 200.

15. Admisssion of Evidence.—If a complaint in an action to recover money for legal services is general in its language, and the defendant demands and receives a bill of particulars, he cannot object to the admission of evidence under it. *Tompkins* v. *Mahoney*, 231.

16. Conflict of Testimony.—If the testator devises his "flour mill, with the land

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pertaining thereto, a half league, more
some, that he applied the term "mill
others, that at a different time he applie
land, it is not a case of conflict of testim

17. RECOVERY OF LAND DEVISED.—Such tes
plied the name "mill tract" sometimes
all, and the devisee, to recover the land,
the land intended to be devised. *Id.*

18. PRIVATE ACT.—An act of the Legislatu
made by a Board of Fund Commissioner
of power in the Board, is a private statut
tice as evidence of title unless offered in

19. PRIVATE ACT MUST BE OFFERED IN EVIDEN
of a private act unless offered in evidenc

20. SPECIFICATION OF OBJECTIONS TO CONFI
objection to the confirmation of the re
estimate benefits and assess damages to l
San Francisco, that "the Commissioners
others much below the proper sum," is t
which the objector had no interest was as
with another lot in which the objector h
Josephs, 558.

21. EXECUTION IN EVIDENCE.—An executio
first introducing the judgment on which

22. SHERIFF'S DEED AS EVIDENCE.—A Sheri
without first introducing the judgment w
authority to sell. *Id.*

See WATER RIGHTS, 4; JUSTICE OF THE PE
CRIMINAL LAW, 8, 15; PROMISSORY NOTE,
5, 16; DEED, 5; CORPORATION, 1, 2.

EXCEPT

See PRACTICE, 1, 8, 9, 1

EXECUTORY C

See MORTGAG

EXECUT

See JUDGMEN

EXECUT

See JUDGMENT, 10; WIL

FEES

1. FEES OF JUSTICE IN SAN FRANCISCO.—
entered upon, a Justice of the Peace in S
for all services rendered, including the
Anderson v. *Pennie*, 265.

FILING AN

See PLEADI

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FINDINGS OF FACT.

1. REVIEW OF FINDINGS OF FACT.—Findings of fact cannot be reviewed by the appellate Court on an appeal from a judgment. *Racouillat* v. *Rene*, 450.

See CERTIORARI, 2.

FORCIBLE ENTRY AND DETAINER.

1. COMPLAINT IN FORCIBLE ENTRY AND DETAINER.—Forcible entry and forcible detainer are separate causes of action, and ought to be separately stated in different counts in the complaint. If not so stated in the complaint it is bad on demurrer, but if the complaint is not demurred to the objection is waived. *Valencia* v. *Couch*, 340.
2. PLEADINGS IN FORCIBLE ENTRY AND DETAINER.—The offences mentioned in the Forcible Entry and Detainer Act should be separately stated in the complaint; and fraud, if relied on, should also be separately stated. *Id.*
3. AMENDMENT TO COMPLAINT.—If the plaintiff sues upon one only or upon two of the causes of action mentioned in the Forcible Entry and Detainer Act, and the testimony makes a cause of action named in the act, but not set out in the complaint, it is the duty of the Court on its own motion, or on the motion of the plaintiff, to permit him to amend his complaint to suit the testimony. *Id.*
4. POSSESSION OF LOT.—A person has possession of a lot twenty-eight feet by one hundred and thirty-two sufficient to enable him to maintain forcible entry and detainer, if it adjoins a lot on which he lives, and has a stable on it, and he cultivates it, even though the fence inclosing the whole is not very substantial. *Id.*
5. ENTRY UPON ANOTHER'S POSSESSION.—One entering upon a lot in the possession of another does not effect a complete entry and acquire possession until he has expelled the party in possession and effected an exclusive lodgment. *Id.*
6. FORCIBLE ENTRY.—For the purpose of determining whether an entry is forcible, all that transpires between the parties from the time of the coming of one until the going out of the other is to be taken into account. *Id.*
7. WHAT CONSTITUTES FORCIBLE ENTRY.—One who goes to a lot in another's possession, accompanied by several men, and builds a fence around it, while the former possessor is remonstrating, and removes him from the line of the fence where he places himself to prevent the fence from being built, is guilty of a forcible entry.

See LANDLORD AND TENANT, 1, 2, 3, 4.

FRAUD.

See CONTRACTS, 6.

FORMER ACTION PENDING.

See PENDENCY OF ANOTHER ACTION, 1.

FORMER CONVICTION.

See CRIMINAL LAW, 29.

GOLD COIN.

See JUDGMENT, 1, 7; MUNICIPAL CORPORATIONS, 10.

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GRAND JU

1. GRAND JURY.—If there is more than one p
the grand jury, and out of the grand juro
panelled as a grand jury for the term, and
as to the guilt of one of the persons in cus
that reason, the Court may direct the jury
the challenger, and summon a special gran
Manahan, 68.

2. IDEM.—In such case the Court need not im
the challenger's case, by taking the ten who
mainder of the panel out of the other juro
moned; but may in its discretion summon s
See CRIMINAL PRAC

GUARDIAN

1. GUARDIAN CANNOT DISPUTE LEGALITY OF E
appointed guardian of an infant minor by th
appointment, and by virtue thereof becom
estopped from denying the jurisdiction of
pointment. *Fox* v. *Minor*, 111.
See PARTIES TO AC

HABEAS COR
See CRIMINAL LAW

HOMESTEA

1. HOMESTEAD.—A homestead cannot be carv
or tenancy in common, even if the joint ten
the homestead, is in the exclusive possession

HUSBAND AND
See COMMON PROPE

INDEMNITY B
See BOND, 1.

INJUNCTION

1. INJUNCTION IN ACTION TO QUIET TITLE.—If
title, a decree inserted in the judgment enj
further contest on plaintiffs' title, even if no
fendant. Such decree does not preclude defe
after acquired title. *Reed* v. *Calderwood*, 1

2. INJUNCTION TO PREVENT A THREATENED TRES
threatened trespass on land, where the trespa
substance of the land, which could not be sp
590.

3. INJUNCTION WHEN PLAINTIFF IS IN POSSESSI
threatened injury to real property in the nat
is in possession of the land. *Id.*

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1. PETITION IN INSOLVENCY.—A petition in insolvency may be addressed to the Court, or the Judge thereof, and may be entitled as being in the matter of the application of the insolvent to be discharged from his debts, though not necessarily so. It may be brief and refer to the schedule. *Wilson* v. *His Creditors*, 406.
2. IDEM.—If the insolvent wishes to be discharged from debts not described, or imperfectly described in his schedule, he must so state in his petition. *Id.*
3. IDEM.—The insolvent need not sign his petition, nor is it indispensable that it be signed by his attorney, but the insolvent must sign personally at the foot of the schedule. *Id.*
4. IDEM.—The petition and schedule constitute one paper, and constitute the complaint. *Id.*
5. IDEM.—The schedule of an insolvent must be verified, but the petition need not be verified. *Id.*
6. SCHEDULE OF INSOLVENT.—The schedule of an insolvent should consist of three parts, and the inventory of his estate should be made as full and complete as possible; but in the enumeration of his losses and debts there is no special reason for much exactness or detail. *Id.*
7. OPPOSITION TO DISCHARGE OF INSOLVENT.—Creditors may oppose the discharge of an insolvent on two grounds: first, any supposed illegality in the appointment of an assignee; and second, any supposed fraud committed by him. Opposition on the first ground raises an issue of law as to the validity of all the previous proceedings; on the second, an issue of fact. *Id.*
8. PLEA TO CHARGE OF FRAUD.—To the charge of fraud, the insolvent may demur, or he may plead guilty or not guilty. *Id.*
9. DEFECTIVE SCHEDULE OF INSOLVENT.—If in the opinion of the creditors the schedule of the insolvent is defective, they should reach the defect by making a charge of fraud, and on the trial examine the insolvent on oath, and in that way elicit information as to his affairs, and not by a demurrer. *Id.*
0. STATEMENT OF INSOLVENT'S LOSSES.—A summary statement of the insolvent's affairs and a list of his losses may be inserted in his petition instead of his schedule. *Id.*
1. IDEM.—If the insolvent's statement of his affairs and list of losses and estate is meagre in detail, the defect cannot be reached by an objection to the same as to matter of substance. *Id.*

INSTRUCTIONS TO A JURY.

1. GIVING SAME INSTRUCTION TWICE.—If the Court has already given the law correctly to the jury upon a given point, it is not error to refuse a second instruction upon the same point. *People* v. *Williams*, 280.
2. MODIFYING INSTRUCTIONS.—The Court may modify instructions asked by counsel before giving them. *Id.*

See NEW TRIAL, 6; CRIMINAL LAW, 20, 21, 22, 23, 24, 28, 31.

INTEREST.

1. INTEREST ON JUDGMENT.—When the judgment is not rendered by default, but upon answer and after trial, the interest may be added to the principal, and the judgment may direct the whole sum to draw the same rate of interest which the principal drew by the contract, although the complaint does not pray that the judgment draw interest. *Corcoran* v. *Doll*, 82.

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JOINDER OF

1. JOINDER OF ACTIONS IN COMPLAINT.—1 complaint a claim for damages, as as while it was owned by his grantor, and injury to the land. *More* v. *Massini*, 5

2. JOINDER OF ACTIONS FOR INJURY TO P same complaint a cause of action for dist and the property injured in each cause c may be either personal or real. *Id.*

See MISJOINDER

JUDGMEN

See DEMU

JUDGM

1. JUDGMENT ON BOND OF GUARDIAN.—In a given by the general guardian of an infi specific kind of money, a judgment sho *Fox* v. *Minor*, 111.

2. JUDGMENT ON RETURN OF MANDATE OF the Supreme Court of the United States Court, the judgment thus affirmed bec jurisdiction on the return of the manda judgment. *Mulford* v. *Estudillo*, 131.

3. SATISFACTION OF JUDGMENT BY LEVY mandate from the Supreme Court of the ing the judgment of the Circuit Court, a Court, the issuance of an execution on t erty sufficient to satisfy it is not a satisfa

4. IDEM.—If, on the return of a mandate judgment of a Circuit Court, a new jud and an execution is issued on it, and a le it, and the Circuit Court then sets aside to be enforced, the levy is not a satisfacti

5. SATISFACTION OF JUDGMENT.—If, after a property to satisfy a judgment, the Cou forced, the order releases the levy, and it judgment. *Id.*

6. JUDGMENT IN SUPREME COURT.—If the never had a cause of action against the d a judgment in his favor, and may either the Court below, or may remand the cau

7. JUDGMENT ON BOND.—In an action agai official bond, if the bond contains no pr be rendered payable in money generally well as sureties. *Mendocino Co.* v. *Mor*

8. JUDGMENT.—The entry of a judgment in duty of the Clerk. *Genella* v. *Relyea*, 1.

9. JUDGMENT IN ACTION TO SET ASIDE DE against one of several defendants, in an

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the plaintiff's title, is an adjudication that the title is in the plaintiff. *Marshall* v. *Shafter*, 176.

10. JUDGMENT AGAINST EXECUTOR.—A judgment against an executor for a demand against the testator, should direct that the same be paid in due course of administration. *Racouillat* v. *Sansevain*, 376.

11. JUDGMENT OF DISTRICT COURT BY DIRECTION OF SUPREME COURT.—If the Supreme Court directs the District Court to enter a judgment in a case in particular form, the District Court has no authority to enter a different judgment from that directed, even if the judgment directed to be entered fails to give the party what was justly or legally his due. *Argenti* v. *Sawyer*, 414.

See CRIMINAL LAW, 4; INTEREST, 1; PLEADINGS, 7, 30; EVIDENCE, 13; MUNICIPAL CORPORATIONS, 9, 10, 12; PARTITION, 2; TAXES, 10, 11, 12; ABATEMENT, 1; EJECTMENT, 26; STIPULATION, 1.

JUDICIAL NOTICE.

1. OF WHAT COURTS WILL TAKE JUDICIAL NOTICE.—Courts will take judicial notice of the fact as to who holds the office of Tax Collector of a county or district, and as to who fills the various county offices within their jurisdiction, and of the genuineness of their signatures. *Wetherbee* v. *Dunn*, 106.

See EVIDENCE, 17, 18.

JURISDICTION.

1. JURISDICTION OF COUNTY COURTS TO FIND INDICTMENTS.—If a new county is created out of a part of the territory of an old one, with its organization to be effected at a future time, the County Court of the old county has jurisdiction to find indictments for crimes committed in the territory of the new county, between the time of the passage of the law and the organization of the new county. *People* v. *McGuire*, 140.

2. JURISDICTION OF DISTRICT COURTS AS TO TRIALS FOR CRIMES.—If the act creating a new county out of a part of the territory of an old one, transfers the new county to a different judicial district from the old one, the District Court of the new county has jurisdiction to try all indictments for murder found in the County Court of the old county, but committed in the new county after the passage of the act, provided the trial is not had until the new county is organized. *Id.*

See WRIT OF ERROR, 1; SAN FRANCISCO, 1; ABATEMENT, 1.

JURY.

1. JURORS SPEAKING DIFFERENT LANGUAGES.—The proviso to the act concerning jurors, excepting the counties of Monterey, etc., from the provisions of the act which requires the juror to understand the language in which the proceedings of the Court are had, does not deprive the Court in one of the excepted counties of the power to excuse jurors of its own motion, when those on the same panel speak several different languages. *People* v. *Arceo*, 40.

2. IDEM.—Such proviso can have effect by construing it to mean that a want of sufficient knowledge of the language in which the proceedings of the Courts are had is not a legal disqualification of a juror, but that the Court may require in its discretion all the jurors on the same panel to understand the same language. *Id.*

3. COURT MAY EXCUSE JURORS.—The Court may, of its own motion, for any good reason, excuse a qualified juror from sitting on the panel in a criminal case; and this will not be error, if the defendant is tried by a jury of lawful men. *Id.*

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4. IDEM.—A party on trial is entitled to a li
ter of absolute right, to have the first j
statutory qualifications, sit in his case.
5. JURY JUDGES OF FACTS.—It is the provin
say whether a fact is proved or otherwise.

See CRIMINAL PR.

JUSTICE OF TH

1. EVIDENCE OF WHAT OCCURRED BEFORE J
County Court on an appeal from a Justic
County Court, the County Court may ta
mitted by the Justice as to what occurred
of appeal, and may also take testimony s
the Justice has omitted to make the rec
Hamilton, 49.
2. JUSTICE'S DOCKET AS EVIDENCE.—A Justic
its omissions may be supplied from other

See CERTIORARI, 1, 2; APPEAL BOND, 1, 2;

LANDLORD AND

1. TENANT WHO SUB-LEASES.—If the lessee
entire term of his lease from the lessor, n
the expiration of the term. The right of e
Blumenberg v. *Myres*, 93.
2. CREATION OF A NEW TENANCY.—If a ten
expiration of his term procures the landlo
mencing at the expiration of the term, a n
created. The new tenancy is only for one
3. TAKING A NEW LEASE.—If the tenant take
ing the amount of rent paid and the length
ration of the lease, the new term will be fo
new tenancy by implication arises in such
4. CREATION OF A NEW TERM.—When the le
ceives rent after the expiration of the term
subject to the covenants and conditions of
not necessarily for one year. *Id.*

See EJECTMENT, 21, 22,

LAND.

1. SALT MARSH LANDS.—The term "salt ma
State, applies to a certain class of swamp a
under the Arkansas Act. *Rondell* v. *Fay*,
2. TIDE LANDS.—The descriptive phrase "t
State, applies to land covered and uncovere
owns by virtue of its sovereignty. *Id.*
3. LAND HELD BY STATE BY SOVEREIGNTY.—
virtue of its sovereignty is such as is cover
of the neap or ordinary tides. *Ward* v. *Mu*
4. SALE OF LAND HELD BY STATE BY ITS S

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disposition of the lands it holds by virtue of its sovereignty prejudicial to the rights of the public to use them for navigation and fishery, but it may dispose of such lands for the purpose of promoting the interests of navigation or of reclaiming them from the sea, where it can be done without prejudice to the public right of navigation. *Id.*

See TITLE, 1, 2, 3; PATENT, 3, 4; MEXICAN GRANTS, 1, 2, 3, 4; SAN FRANCISCO, 1.

LAW OF A CASE.

1. LAW OF A CASE.—The decision of the Supreme Court becomes the law of the case on a second appeal, whether all, or a part, or none of the facts bearing on the points decided are mentioned in the opinion. *Mulford* v. *Estudillo*, 131.
2. IDEM.—The discussion and determination, in an opinion of the Supreme Court, of other points not tending to the decision of the point upon which the appeal was disposed of, must be regarded as dicta, and not as the law of the case. *Id.*
3. LAW OF CASE.—A decision of the Supreme Court in a case becomes the law of that case in all its stages. *Argenti* v. *Sawyer*, 414.
4. LAW OF CASE.—A question made and passed on by the appellate Court in a particular case becomes the law of that case in all its stages. *Kile* v. *Tubbs*, 332.

See JUDGMENTS, 11.

LAWS OF ANOTHER STATE.

1. LAWS OF ANOTHER STATE.—In the absence of proof on the subject, the presumption is that the laws of another State are the same as those of this State. *Hill* v. *Grigsby*, 55.

LAWS.

See EVIDENCE, 18, 19.

LEGISLATIVE ACT.

See EVIDENCE, 18, 19.

LIEN.

1. LIEN OF VENDOR.—The vendor of real estate has a lien on the same for the unpaid purchase money, and such lien attaches to the land equally whether it has been conveyed to the vendee or is only contracted to be conveyed. *Hill* v. *Grigsby*, 55.

See ATTACHMENT, 1, 2, 3; MORTGAGE, 6, 7.

LIMITATION OF ACTIONS.

1. LIMITATION OF ACTIONS.—The limitation of actions for relief on the ground of fraud, to three years after the discovery of the fraud alleged, does not apply to an action to set aside and cancel a conveyance upon the ground that it is a cloud upon the title of the plaintiff, even if the Court is asked to set aside the conveyance because it was made to defraud a creditor. *Stewart* v. *Thompson*, 260.

See WATER RIGHTS, 6, 9.

MANDAMUS.

1. WRIT OF MANDATE TO JUSTICE.—A writ of mandate will issue to compel a Justice of the Peace to enter a judgment of discontinuance. *Anderson* v. *Pennie*, 265.

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MARRIEI

1. CONTRACT OF MARRIED WOMAN.—If a heritance in California before its trans tract concerning it is not governed by rights and duties of husband and wife
2. SEPARATE PROPERTY OF WIFE.—Pro woman in California before its cessio property under the Mexican law. *Id.*
3. POWER OF ATTORNEY OF MARRIED WO executory contract, by her attorney in by her in California before its cession be such attorney in fact. *Id.*

See D

MARSH

See L

MEXICAN

1. RIGHT TO LAND ACQUIRED FROM MEXI eignty of California from Mexico to th the inhabitants to their land which the such transfer. *Ward* v. *Mulford*, 365.
2. TITLES ACQUIRED FROM MEXICO IN CAL quisition of California from Mexico, w acquired by the inhabitants under Mex equitable claims as had their origin in were inchoate at the date of the succes sary to perfect the same. *Id.*
3. RIGHT OF CALIFORNIA TO LAND WITHI came into the Union, with her claim to took by virtue of her admission under made by the Federal Government, and the same source, and such as she then ordinate to the prior equities of grante by the action of the Federal Governmen *Id.*
4. MEXICAN GRANT OF LAND OVERFLOW confirmed the title to land in this Stat rule, and which the State would otherwi the State has no power to dispose of th

See TITLE, 2, 3; ESTOPPI

MINI

See WATER

MISJOINDER

See PLEAI

MON

1. A MONTH.—The month contemplated and not a lunar month. *Savings and*

67

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1. TENDER OF MORTGAGE DEBT.—A party having no interest in the mortgaged premises or in the tender made, has no right to make a tender on his own behalf of the amount due on the mortgage. *Mahler* v. *Newbaur*, 168.

2. IDEM.—When a tender of the amount due on a mortgage is made by a stranger, and not the party in interest, the creditor must be informed on whose behalf it is made; and if not so informed, the tender is invalid. *Id.*

3. RECORDING INSTRUMENTS NOT SEALED.—Mortgages and conveyances which are not under seal, are not entitled to be recorded. *Racouillat* v. *Sansevain*, 376.

4. NOTICE IMPARTED BY RECORDING DEEDS.—The record of mortgages and conveyances which are not under seal, does not impart notice to subsequent purchasers or incumbrancers. *Id.*

5. EXECUTORY CONTRACT FOR MORTGAGE.—An agreement in writing, which by its terms makes a sum of money due from one to the other chargeable as a lien upon land, but which is neither under seal, nor so executed or acknowledged as to make it a mortgage within the act concerning conveyances, will be regarded as an executory agreement for a mortgage, and enforced in equity as a specific lien upon the land, as against the person executing and strangers having actual notice. *Id.*

6. AGREEMENT CREATING INCUMBRANCE ON LAND.—An agreement not so executed or sealed as to make it a mortgage, signed by both parties, which provides that the purchase money of land shall be secured by the property if not sold, or by the purchase money if sold, is an incumbrance on the land as against the party executing and strangers with actual knowledge, which may be removed by a sale and substituted security on the purchase money. *Id.*

7. COVENANT IN A MORTGAGE.—If the mortgagor covenants in the mortgage that he will pay and discharge, whenever the same becomes due, all legal mortgages and incumbrances, of whatever nature and description, upon the mortgaged property, of a previous date, the covenant will make the mortgagor personally liable for a sum due and secured by an executory contract for a mortgage not under seal or recorded, if the mortgagor had actual notice of it, and the mortgage will become security for the performance of this covenant. *Id.*

8. MORTGAGEE IN POSSESSION.—If permanent improvements, made by a mortgagee in possession, do not cost him anything, he is not entitled to anything for their construction, in an accounting with the mortgagor concerning rents and profits. *Hidden* v. *Jordan*, 397.

9. ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE.—A mortgagee in possession cannot charge the mortgagor, in an accounting concerning rents and profits, with the cost of constructing new and permanent improvements, unless there are special circumstances requiring their construction. *Id.*

10. TAKING AN ACCOUNT.—If, in an accounting concerning the rents and profits of land, between the mortgagor and mortgagee in possession, the testimony shows that the mortgagee paid expenses as he went along and had a balance in his hands at the end of the year, he should be charged with such balance. *Id.*

11. COVENANT IN MORTGAGE.—A covenant of the mortgagor inserted in the mortgage, to "pay and discharge all legal mortgages and incumbrances of whatever nature and description" on the premises mortgaged, does not put a purchaser from the mortgagor upon inquiry as to any mortgages or incumbrances not of record. A purchaser from the covenanter cannot be charged with constructive notice of a recorded mortgage not under seal. *Racouillat* v. *Rene*, 450.

12. RELIEF GRANTED WHEN MORTGAGE IS SET OUT IN COMPLAINT.—If the complaint

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tains a copy of it, and also avers facts making it an equitable mortgage, and it appears to be in fact an equitable mortgage, the plaintiff is entitled to have it enforced as such. *Love* v. *Sierra Nevada Lake Water and Mining Co.*, 639.

13. MORTGAGE OF CORPORATION.—A mortgage purporting to be the mortgage of a corporation, but signed by its trustees individually, and not by the corporation by its trustees, is not the legal mortgage of the corporation. *Id.*

14. IDEM.—Though such mortgage does not bind the corporation as a legal mortgage, yet it does not follow that it may not be enforced in equity. *Id.*

15. WHEN MORTGAGE MADE BY AGENT WILL BE ENFORCED IN EQUITY.—A mortgage on real estate, made by an agent for his principal, though inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority and the failure to execute in the name of the principal resulted from accident or mistake, and will be enforced against the principal and subsequent lien creditors, and also against subsequent purchasers with notice. *Id.*

16. IDEM.—Such mortgage does not require reformation, but is ripe for enforcement according to the methods peculiar to Courts of equity. *Id.*

17. IDEM.—It is of no equitable moment whether the mistake in the execution of such mortgage was one of law or one of fact. *Id.*

18. CONTRACT FOR MORTGAGE NEED NOT BE UNDER SEAL.—A contract for a mortgage need not be under seal, and when made through an attorney in fact his authority need not be evidenced by an instrument under seal, nor is it indispensable that such contract should be executed in the name of the principal. *Id.*

See REFERENCE, 1; RECORDING INSTRUMENTS, 1, 2; TAXES, 8, 9, 10; PLEADINGS, 82.

MUNICIPAL CORPORATIONS.

1. PUBLIC STREETS OF OAKLAND.—The resolutions of the City Council of Oak to improve the public streets and to accept bids to perform the work need r approved by the Mayor. *Beaudry* v. *Valdez*, 269.

2. IDEM.—Mecadamizing the streets and curbing the sidewalks are made ute distinct kinds of improvement in Oakland, and the former does no the latter. *Id.*

3. CONTRACT TO IMPROVE STREETS IN OAKLAND.—A contract in Oakland a public street is valid only for such improvements as are named in th of intention to improve, passed by the Common Council. If such r clares only an intention to macadamize, the contract should not be macadamizing and curbing the sidewalk. *Id.*

4. IDEM.—If the contract to improve a street in Oakland includes not named in the resolution of intention, the contractor can recov as is named in the resolution, if it can be separated from the oth *Id.*

5. DUTY OF MAYOR OF OAKLAND.—The fact that the Mayor of C election, had become the assignee of a contract for the impr as security for a debt due him by the contractor, does not af contract or of the assessment for the work, nor incapaci signing the warrant for the collection of the assessment.

6. IDEM.—The act of the Mayor of Oakland in countersigni lection of an assessment for street improvements is pur

7. APPEAL TO COMMON COUNCIL OF OAKLAND.—If there is of the Mayor of Oakland in countersigning a warr

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assessment for a street improvement, such irregularity is waived by a failure to appeal from the act of the Mayor to the Common Council. *Id.*

8. IDEM.—If there is any irregularity in the demand for the amount of an assessment for a street improvement in Oakland, or any defect in the assessment roll, the same is waived by a failure to appeal to the Common Council. *Id.*

9. JUDGMENT FOR STREET ASSESSMENT IN OAKLAND.—A personal judgment for the amount of an assessment for a street improvement in Oakland should not be rendered against the defendant for a deficiency which may remain due after the enforcement of a lien on the lot. *Id.*

10. STREET ASSESSMENT COLLECTABLE IN GOLD COIN.—A tax due for an assessment for improving a street in Oakland, may be assessed upon a gold basis and collected in gold coin. *Id.*

11. STREET CONTRACTS IN SAN FRANCISCO.—After the Board of Supervisors of San Francisco have taken steps to acquire jurisdiction, and have ordered a public street of said city to be improved, and have let the contract, if the contractor fails to enter upon the performance of the work within the time fixed in his contract to perform, the Board may re-advertise for bids and re-let the contract without taking steps to acquire jurisdiction as in the first instance. *Dougherty* v. *Foley*, 402.

12. ORDER TO IMPROVE A PUBLIC STREET.—An order to improve a public street, made by the Board of Supervisors of San Francisco, after having acquired jurisdiction, is in the nature of a judgment. *Id.*

See TAXES, 5, 6, 13, 14, 16, 17, 18, 19, 20, 21; SAN FRANCISCO, 1; RAILROADS, 1, 3, 4; CONTRACTS, 6; CONSTITUTIONAL LAW, 2; NEW TRIAL, 10; CONDEMNATION OF LANDS, 1.

NAVIGATION.

See LAND, 4.

NAVIGABLE WATERS.

See LAND, 4.

NEW TRIAL.

1. NEW TRIAL.—A judgment will not be reversed on the ground that the verdict is contrary to the evidence, if the testimony is conflicting. *Wilkinson* v. *Parrott*, 102.

2. REVERSAL OF JUDGMENT.—A judgment will not be reversed for an error favorable to the appellant. *Id.*

3. NEW TRIAL.—A new trial should not be granted on the ground that the verdict is against evidence, unless the verdict is so clearly against evidence as to leave no room for doubt. *Hill* v. *Smith*, 166.

4. NEW TRIAL.—If the party intending to move for a new trial does not file his statement within five days after giving notice of such intention, the statement should be disregarded. *LeRoy* v. *Rassette*, 171.

5. IDEM.—A party giving notice of motion for a new trial is bound by that notice. He cannot afterwards give a second notice, and file his statement within five days of the second notice, but more than five days after the first notice. *Id.*

6. NEW TRIAL ON GROUND OF SURPRISE.—In order to sustain a motion for a new trial on the ground of surprise, the moving party must show not only surprise, but that he is injured by it; and this he must do by showing what case he can establish in the event of a new trial. *Brooks* v. *Douglass*, 208.

7. INSTRUCTIONS TO JURY.—It is not error for the Court to refuse to instruct the jury

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upon a point in relation to which there is no evidence. *Tompkins* v. *Mahoney*, 231.

8. NEW TRIAL.—A new trial will not be granted on account of the giving of instructions to the jury which could not have injured the party complaining. *Id.*

9. SPECIFICATION OF ERRORS IN STATEMENT.—A motion for a new trial should be denied unless the statement specifies the particular errors upon which the moving party will rely in support of his motion. If there is only one question of error that could be raised on the record, this does not excuse the necessity of specifying it. *Zenith Gold and Silver Mining Company* v. *Irvine*, 302.

10. NEW TRIAL.—If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted on the ground that the evidence is insufficient to justify the verdict. *Kile* v. *Tubbs*, 332.

11. NEW TRIAL IN CASE OF REPORT OF COMMISSIONERS.—The rule that a verdict will not be set aside and a new trial granted, on the ground that it is contrary to the evidence, where there is a substantial conflict in the same, applies to the report of the Commissioners appointed to assess the damages and estimate the benefits resulting from the widening of a street, and to the judgment of a Court affirming the report, where the Commissioners make a personal inspection of the premises, with even greater force than to verdicts of juries, or findings of a Court based on evidence alone. *Appeal of Piper*, 530.

12. NEW TRIAL.—The rule laid down in Piper's Appeal, ante 530, as to granting a new trial on the ground that the judgment is not warranted by the evidence, affirmed. *Appeal of Brooks and Josephs*, 558.

13. STATEMENT MUST SPECIFY HOW EVIDENCE IS INSUFFICIENT.—If the statement on motion for a new trial does not specify the particulars in which the evidence is alleged to be insufficient, the appellate Court will assume the facts admitted in the pleadings as well as those found. *Love* v. *Sierra Nevada Lake Water and Mining Company*, 639.

14. DENYING NEW TRIAL.—An order dismissing a motion for a new trial is in effect denying a new trial. *Warden* v. *Mendocino Co.*, 655.

15. REASONABLE DILIGENCE IN MOVING FOR NEW TRIAL.—If the Judge who tried a cause goes to a county in his district not adjoining the one in which the case was tried, to hold Court, before the time for filing amendments to the statement on motion for new trial has expired, the moving party prosecutes the motion with due diligence if he brings the same to a hearing when the Judge returns or first holds Court in a county adjoining the one in which the case was tried. *Id.*

16. BILL OF EXCEPTIONS.—If a bill of exceptions, made to an order dismissing motion for a new trial, recites the giving of a notice and the different steps tak in prosecuting the motion, it will be received in the appellate Court as evid of the facts recited, without including the notice, statement, etc., in the t cript. *Id.*

See JUDGMENT, 6; PRACTICE, 3, 4, 6, 7; TAXES, 13, 14.

NONSUIT.

See DISMISSAL OF ACTION; EJECTMENT, 23; PRACTICE, 16.

NOTICE.

See MORTGAGE, 4, 5, 6; RECORDING INSTRUMENTS, 1, 2; JUDICIAL

OAKLAND.

See MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 5.

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OFFICE.

1. APPOINTMENT TO OFFICE.—The Boards of Supervisors, in filling vacancies in office, appoint to office; they do not elect. *Conger* v. *Gilmer*, 75.
2. APPOINTMENT BY BOARD OF SUPERVISORS.—The appointment to office by the Board of Supervisors is not complete until the person appointed has received a certificate of his election under the seal of the Board, signed by the proper officers of the Board. An appointment made by a majority of the Board may be revoked at any time before such certificate is issued, and another person may be appointed. *Id.*
3. ELECTION TO OFFICE.—In the case of an election to office by the people, the rule is different, and the issuance of a commission is a mere ministerial act. *Id.*
4. ELIGIBILITY TO OFFICE OF DISTRICT ATTORNEY.—There is nothing in the Constitution or laws of this State, nor is there any usage or custom which requires that a license to practice law from the Supreme, or any other Court, must be obtained before a person can become eligible to the office of District Attorney. *People* v. *Dorsey*, 296.

OFFICERS.

See OFFICE, 1, 2, 3.

OFFICIAL BOND.

See PLEADINGS, 6, 7, 8; PARTIES TO ACTIONS, 2; BOND, 2.

OUSTER.

See EJECTMENT, 18.

PARALLEL LINES.

See DEED, 6.

PAROL TESTIMONY.

See EVIDENCE, 2.

PARTIES TO ACTIONS.

1. PARTY PLAINTIFF.—A guardian of an infant cannot sue in his own name to recover money due the infant. Such action must be brought in the name of the infant by his guardian. *Fox* v. *Minor*, 111.
2. PLAINTIFF IN SUIT ON OFFICIAL BOND.—If the complaint on the official bond of a County Treasurer avers that the money for which the Treasurer is in default belongs to the county, the action is properly brought in the name of the county. *Mendocino County* v. *Morris*, 145.

See PROMISSORY NOTE, 4; PRACTICE, 16; EJECTMENT, 22, 23; ASSIGNABLE DEMAND, 1.

PARTITION.

1. ISSUES IN PARTITION.—If, between the parties to an action for partition, disputes exist as to their rights or interests in any respect, such disputes may be litigated and determined. *Morenhout* v. *Higuera*, 289.
2. JUDGMENT IN PARTITION.—A judgment in an action for partition is binding and conclusive as to title upon all the parties who are served with summons or appear, and a bar to a new action. *Id.*

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some interest in the land, which interest is unknown to plaintiff, and a summons is served on such defendant, and he fails to appear, and the judgment does not give such defendant any interest, it is *res adjudicata*, and estops him from recovering in a new action. *Id.*

4. IDEM.—The effect of a judgment in partition is to be determined by our statute, and not by the common law. *Id.*

See CONTRACTS, 4, 5.

PATENT.

1. VOID PATENT.—If a patent for land shows upon its face that it is void, it may be attacked, either directly or collaterally, by any party interested in disputing its validity. *Rondell* v. *Fay*, 354.
2. PATENT VOID UPON ITS FACE.—If a patent shows that it was issued in the absence of legislation directing a sale of the property described, it is void upon its face. *Id.*
3. A PATENT GOOD IN PART AND BAD IN PART.—If the law authorizes the sale of such land only as is under water at ordinary high tide, and belongs to the State by virtue of its sovereignty, and the patent conveys both swamp and overflowed lands, held by the State under the Arkansas Act, and lands owned by the State by virtue of its sovereignty, the patent is good in part and bad in part. *Id.*
4. PARTY RELYING ON PATENT GOOD IN PART.—If a patent is good in part and bad in part upon its face, and in its description of the land does not separate the good part from the bad, the party relying upon it must show himself within its good call. *Id.*

See TITLE, 1

PENDENCY OF ANOTHER ACTION.

1. DEFENCE OF PENDENCY OF ANOTHER ACTION.—The defence of the pendency of another action is not available, unless the causes of action and the plaintiffs, at least, in both actions, are the same. *Ayres* v. *Bensley*, 620.
2. IDEM.—In an action to quiet plaintiff's title to land, alleged to be clouded by defendants giving out that the title is in themselves and not in plaintiff, an action of ejectment pending, in which the defendant does not ask for affirmative relief, is not available as a defence. *Id.*

PLEADINGS.

1. DENIALS IN ANSWER.—If several averments in a complaint are conjunctively stated, an answer attempting to deny them by repeating them in their conjunctive form does not raise an issue. *Reed* v. *Calderwood*, 109.
2. AVOIDING ADMISSION IN ANSWER.—If a complaint to quiet title avers plaintiff's possession, and the answer admits the averment, this admission is not avoided by a special averment that plaintiff obtained possession by collusion with defendant's tenant. *Id.*
3. PLEADINGS.—If the answer in an action to quiet title admits plaintiff's slip in fee simple and possession, the rightfulness of the possession by admission, and even if plaintiff went into possession by leave of defendant, he is not estopped from denying defendants' title. *Id.*
4. WHEN ANSWER IS CONSIDERED FILED.—If the plaintiff amends his complaint and the defendant obtains an order to have his answer on file as to

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to the amended complaint, the answer is to be treated as if filed when the order is made. *Mulford* v. *Estudillo*, 131.

5. ADMISSION OF FACTS ON THE RECORD.—When an ultimate fact is admitted on the record, probative facts tending to establish, modify, or overcome it, will not be considered by the Court. *Id.*

6. COMPLAINT ON OFFICIAL BOND.—If the complaint on an official bond in a suit against the principal and his sureties avers the execution of the same by both principal and sureties, and a copy of the bond is annexed to the complaint which does not contain the signature of the principal, the complaint is good unless demurred to specially for being ambiguous in this respect. *Mendocino County* v. *Morris*, 145.

7. EXECUTION OF OFFICIAL BOND.—If the complaint on an official bond avers the due execution of the same by both principal and sureties, and the answer takes issue on the averment, and verdict and judgment are for plaintiff, the judgment will not be disturbed on appeal upon the judgment roll on the ground that what purports to be a copy of the bond annexed to the complaint does not contain the signature of the principal. *Id.*

8. BREACH OF OFFICIAL BOND.—An averment in a complaint on a County Treasurer's official bond that he received money belonging to the county and retains it, and refuses to deliver it to his successor in office, is a sufficient averment of a breach of its conditions. *Id.*

9. COMPLAINT FOR GOODS SOLD.—A complaint for goods sold, which avers that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has not paid for the same, states a cause of action. *Abadie* v. *Carillo*, 172.

10. ISSUES OF LAW AND FACT.—When there is both a demurrer and an answer to the same complaint, raising both an issue of law and fact, the issue of law should first be disposed of. *Brooks* v. *Douglass*, 208.

11. IDEM.—When there are both issues of law and fact joined in the same cause, and the cause is tried on the issues of fact and a judgment rendered, the presumption will be indulged, on appeal, that the issue of law had first been disposed of. *Id.*

12. DEMURRER AND ANSWER.—An issue of law and fact should not be mixed in an answer. A demurrer should be filed as a separate pleading. *Id.*

13. ANSWER IN ACTION FOR TRESPASS IN OPENING ROAD.—In an action for damages for an alleged trespass upon the plaintiff's land, if the defendant justifies the alleged trespass under the act in relation to laying out and establishing roads, he must in his answer show a strict compliance with all the provisions of the statute. *Sherman* v. *Buick*, 241.

14. DENIAL OF AN ALLEGATION OF COMPLAINT.—In order to determine whether the denials of an answer are evasive, each separate denial of each separate allegation must be taken by itself. If the answer to a particular allegation is a denial of it, and there is no admission in the answer inconsistent with this denial, an issue is fairly made. *Racouillat* v. *Rene*, 450.

15. IDEM.—Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation. *Id.*

16. PLEADING EVIDENCE.—Evidence should not be alleged in a complaint. Averments of mere evidence are not admitted by failure to deny them in the answer. *Id.*

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17. WHAT ALLEGATIONS MUST BE DENIED.—The defendant in his answer is required to deny only the material allegations of the complaint. *Id.*

18. TREATING AN ALLEGATION OF A COMPLAINT AS DENIED.—If the plaintiff on the trial treats an allegation of the complaint as denied in the answer, and introduces evidence to prove it, he will not be permitted after the issue is found against him to raise the point for the first time in the Supreme Court that such allegation is not denied. *Id.*

19. PLEADINGS ON NOTE.—If the complaint in a suit on a note avers that the defendant made and delivered the note to the plaintiff, and that the plaintiff is still the owner and holder, the allegation that plaintiff is the owner and holder is but a conclusion of law, and an answer denying it but admitting the other allegations of the complaint, raises no material issue. *Wedderspoon* v. *Rogers*, 569.

20. IDEM.—Such answer should be stricken out on motion as irrelevant, and plaintiff is entitled to judgment on the pleadings, even if there is an averment in it that the action is not prosecuted in the name of the real party in interest, and that another person owns the note. *Id.*

21. SHAM ANSWER.—If the complaint avers that defendant made and delivered the note to plaintiff, and that plaintiff is still the owner and holder, and the answer denies that plaintiff is the owner and holder, and the plaintiff introduces affidavits showing by a statement of facts that the note is his, and the defendant's counter-affidavits merely state that the answer is true and was put in in good faith, the answer is sham, and should be stricken out as such. *Id.*

22. PLEADINGS.—If the complaint is sworn to, a general denial in the answer admits all its material allegations. *Pico* v. *Colimas*, 578.

23. JUSTIFICATION OF TRESPASS.—In trespass *quare clausum fregit*, where the complaint avers matter of aggravation after the entry, an answer justifying the aggravating matter, but admitting plaintiff's title and possession, does not state facts sufficient to constitute a defence. *Id.*

24. ANSWER IN TRESPASS.—In trespass *quare clausum fregit*, an answer justifying merely because the defendant has an easement on the land, contains no defence. *Id.*

25. IDEM.—An answer justifying a trespass on the ground of official duty should aver that the defendant is an officer, and what his official duty is. If there are other defendants, and the answer is intended to apply to them, it should state that they entered in aid of the officer. *Id.*

26. MISJOINDER OF CAUSES OF ACTION.—If the complaint in an action against a Sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action. *Ghiradelli* v. *Bourland*, 585.

27. COMPLAINT ON SHERIFF'S BOND.—A complaint in an action against a Sheriff and his sureties for an alleged trespass of the Sheriff, which avers that the other defendants than the Sheriff are the securities on his official bond, does not state a cause of action against the Sheriff on the bond. *Id.*

28. IDEM.—A complaint in an action against a Sheriff and his sureties for an alleged trespass of the Sheriff, which merely avers that the sureties are the securities on his official bond, and that the same was duly filed, executed, and recorded, does not state a cause of action on the bond. *Id.*

29. IDEM.—A complaint in an action against a Sheriff and his sureties for an alleged trespass of the Sheriff, should allege that the bond was the Sheriff's official bond, and set out enough of its contents to show that those who signed it were bound to indemnify parties injured by the Sheriff's malfeasance. *Id.*

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30. ANSWER TO AVERMENT OF RECOVERY OF JUDGMENT.—If the complaint avers the recovery of a judgment against one of several defendants, the Court in which it was recovered, and the date and amount of the same, the defendants, in their answer, may deny the same upon information and belief. *Vassault* v. *Austin*, 597.

31. PLEADINGS.—When the material facts alleged are presumptively within the knowledge of the defendant, he must traverse them, if he undertakes to do so, or must state how it is that he is without knowledge of such facts. *Id.*

32. IDEM.—The recovery of a judgment is not presumptively within the knowledge of the defendants. *Id.*

33. SURPLUS AVERMENT IN COMPLAINT.—If the complaint in a foreclosure suit avers that the mortgage was executed by the defendant, (thereby making it by averment a legal mortgage,) and also sets out a copy of the same, and it appears on its face not to be a legal as distinguished from an equitable mortgage, the averment may be rejected as surplusage. *Love* v. *Sierra Nevada Lake Water and Mining Company*, 639.

34. ALLEGATION IN COMPLAINT AS TO CONTRACT SET OUT.—When the plaintiff sets out in his complaint the contract sued on in the terms in which it is written, and then puts a false construction on its terms, the allegation repugnant to its terms should be regarded as surplusage. *Id.*

See VARIANCE, 1, 2; EJECTMENT, 6, 7, 10, 18; JUDGMENT, 6; FORCIBLE ENTRY AND DETAINER, 1, 2, 3; INSOLVENT DEBTORS, 4, 8; EVIDENCE, 20; JOINDER OF ACTIONS, 1, 2; PENDENCY OF ANOTHER ACTION, 1, 2; RES JUDICATA, 3.

POSSESSION OF LAND.

1. POSSESSION OF LAND.—A person who enters into the actual possession of a portion of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure, but acquires possession to all of the land not in the adverse possession of another person at the time of his entry. *Ayres* v. *Bensley*, 620.

2. PRIOR POSSESSOR OF LAND.—Where the title to land rests in possession only, the prior possessor has the better title. *Id.*

See EJECTMENT, 2, 3, 4.

POWER.

See WILL, 3, 4.

POWER OF ATTORNEY.

1. INTEREST WHICH MAKES POWER OF ATTORNEY IRREVOCABLE.—The interest which an attorney in fact must have in order to render his power of attorney irrevocable, must be an interest in the property on which the power is to be exercised, and not an interest in the money derived from a sale of the property. *Barr* v. *Schroeder*, 609.

2. IRREVOCABLE POWER OF ATTORNEY.—A power of attorney may be irrevocable though it is not a power coupled with an interest, as where it is given as security for the payment of money, or is made irrevocable. *Id.*

3. POWER OF ATTORNEY NOT IRREVOCABLE.—A power of attorney which makes the attorney an universal agent for the transaction of all ordinary business will not be held irrevocable, unless its terms are so plain as to need no construction. *Id.*

See MARRIED WOMEN, 1.

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PRACTICE.

1. EXCEPTION TO INSTRUCTIONS.—Instructions given by the Court to the jury must be excepted to, in order to enable the appellant to take advantage of errors in them if such exist. *Wilkinson* v. *Parrott*, 102.

2. TRANSCRIPT ON APPEAL.—A copy of the minutes of the Court, as kept by the Clerk during the progress of the trial, should not be inserted in a transcript on appeal. *Mendocino County* v. *Morris*, 145.

3. MOTION FOR NEW TRIAL.—If there are any technical grounds upon which a motion for a new trial may be resisted, such as failure to file and serve notice of motion or to file statement in time, the proper practice is to raise such grounds on the argument of the motion as a reason why the motion should be denied. *Quivey* v. *Gambert*, 304.

4. IDEM.—A motion for a new trial can be heard only on the record made and settled before the motion is made. *Id.*

5. NEW TRIAL.—An order granting or refusing a new trial can be reviewed by the Supreme Court only on the record made and settled before the order is made. *Id.*

6. IDEM.—On appeal from an order granting or refusing a new trial a statement cannot be annexed to the order. *Id.*

7. STATEMENT ANNEXED TO ORDER.—An order denying or granting a new trial is not one of the orders referred to in section three hundred and thirty-eight of the Practice Act, to which a statement may be annexed on appeal. *Id.*

8. AN EXCEPTION.—An exception is an objection taken between the time of calling the action for trial and the rendition of the verdict or decision. *Id.*

9. BILL OF EXCEPTIONS.—An order striking out a statement on motion for a new trial cannot be brought before the Supreme Court for review by a bill of exceptions. *Id.*

10. COURT SHOULD RULE ON MOTION FOR NEW TRIAL.—A party moving for a new trial is entitled to a ruling upon his motion upon the basis upon which it is presented. If his notice or statement has not been filed or served in time, that is good reason why his motion should be denied. *Id.*

11. STRIKING OUT STATEMENT OR NOTICE.—The Court should not strike out a notice or statement on motion for a new trial. *Id.*

12. AMENDMENTS TO STATEMENT.—A defendant in a motion for a new trial may file amendments to the statement, without waiving his right to object that the notice or statement was not filed or served in time, by a preface that he does so without prejudice to his right to object at the hearing to the notice or statement on these grounds. *Id.*

13. UNDERTAKING ON APPEAL.—When, on account of the insufficiency of the undertaking on appeal, the appellant files a new undertaking in the Supreme Court, approved by one of the Justices, the respondent cannot require the sureties in the substituted undertaking to justify. *Stevenson* v. *Steinberg*, 373.

14. IDEM.—The Justice approving such new undertaking, when called upon to approve the same, will ascertain by examination of the sureties that they possess the necessary qualifications. *Id.*

15. AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL.—An affidavit of service of a notice of appeal on the respondent's attorney, if it does not show a personal service, must state that the notice was left in his office with his clerk, or with a person having charge thereof, or that no person was in the office, and that the notice was left there in a conspicuous place, between the hours of eight in the morning and six in the afternoon. *Doll* v. *Smith*, 475.

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16. DISMISSAL OF ACTION.—The plaintiff in ejectment, if no counterclaim is made in the answer, has a right to dismiss the action as to one or all of the defendants. *Dimick* v. *Deringer*, 488.

17. EVIDENCE BEFORE BOARD OF EQUALIZATION.—The statute does not require the Board of Equalization to take down or preserve the evidence taken before them, nor does it make any provision for settling a statement of a trial before them, or a bill of exceptions taken during its progress; but doubtless some mode might be adopted to authenticate the evidence when required on appeal. *Central Pacific Railroad Company* v. *Placer County*, 582.

18. AMENDMENTS TO STATEMENT.—A reasonable time to prepare and file amendments to a statement on motion for a new trial is five days. *Warden* v. *Mendocino County*, 655.

See APPEAL BOND, 1, 2; VENUE, 1; NEW TRIAL, 8; PLEADINGS, 18; REHEARING, 1; JOINDER OF ACTIONS, 1, 2.

PRIVATE ACT.

See EVIDENCE, 18, 19.

PRIOR POSSESSION.

See EJECTMENT, 3.

PROBATIVE FACTS.

See PLEADINGS, 5.

PROMISSORY NOTE.

1. ERASURES ON NOTE.—A party offering a promissory note in evidence is not obliged before the same is admitted to account for an erasure appearing upon the face of it, unless the erasure has been made or appears to have been made after the execution of the instrument, and is on a part of the note which is material to the point in dispute. *Corcoran* v. *Doll*, 82.

2. ERASURES ON PRINTED NOTE.—When a printed form of a promissory note is used and an erasure is made only as to the printed matter, the presumption is that it was made prior to the execution of the note and to suit the terms agreed on by the parties. *Id.*

3. VARIANCE BETWEEN NOTE AND COPY IN COMPLAINT.—If the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full and states the rate of interest in words as well as figures, the variance is immaterial. *Id.*

4. PLAINTIFFS IN SUIT ON NOTE.—If the promissory note is the separate property of the wife, suit may be brought on it in her name alone, or the husband and wife may sue jointly. *Id.*

5. DEFENCE TO NOTE PAYABLE TO ADMINISTRATOR.—If a party brings suit on a note made payable to him as administrator, and is at the time in possession of the same, evidence is not admissible on behalf of the defendant to prove that the plaintiff is not the real party in interest, even if the money loaned for which the note was given belonged to the estate of the deceased. *Id.*

6. IDEM.—Perhaps, in such case, if the defendant has a counter claim against the estate of the deceased, and the money due on the note would be assets in the hands of the plaintiff, he could set it up in defence *pro tanto*. *Id.*

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7. JOINT MAKERS OF NOTE ALL PRINCIPALS.—In an action on a promissory note against several joint makers, neither can show in defence that as between him and the other joint makers he was only a surety. *Shriver* v. *Lovejoy*, 574.

8. IDEM.—All the makers of a joint and several promissory note, as between themselves and the payee, are regarded as principals. *Id.*

9. IDEM.—If one of the joint makers of a note signed as a surety for the others, and the payee sue all, and attach enough of the property of the principals on the note to secure his pay, and then release it, the surety is not thereby discharged. *Id.*

See EVIDENCE, 7; PLEADINGS, 19, 20, 21.

PROOF.

See VARIANCE, 1, 2; EJECTMENT, 4.

RAILROADS.

1. STREET RAILROADS IN SAN FRANCISCO.—Companies operating street railroads in San Francisco are only required to keep in repair that part of the street lying between the rails along which the cars run and between which the horses travel. They are not required to keep in repair that part of the street lying between a double track. *Robbins* v. *Omnibus Railroad Company*, 472.

2. STREET RAILROAD IS PROPERTY.—The interest in the street of a street railroad company authorized by statute to lay down a track in the streets of a city and run cars over it for the conveyance of passengers for hire, is an easement in the land; and the estate of such company in the street is real property. *Appeal of North Beach and Mission Railroad Company*, 499.

3. STREET RAILROAD, ITS VALUE.—The estate of such street railroad company in the streets of the city is property capable of being enhanced in value by the widening of the street, and by such widening a substantial benefit may accrue to the railroad company. *Id.*

RATIFICATION.

See ATTORNEY IN FACT, 1.

REAL PROPERTY.

See RAILROADS, 1.

RECORDING INSTRUMENTS.

1. RECORDING MORTGAGE.—A mortgage not executed under seal is not entitled to record. *Racouillat* v. *Rene*, 450.

2. NOTICE OF MORTGAGE NOT UNDER SEAL.—The record of a mortgage not under seal does not give constructive notice of its contents, and a subsequent purchaser, unless he has actual notice of such mortgage, is not affected by it. *Id.*

See MORTGAGE, 3, 4.

REFERENCE.

1. TAKING ACCOUNT BY REFEREE.—If the Commissioner to whom a case has been referred to take an account, commits an error at the threshold which unsettles the account, the Court is not bound to go over the account and correct the error, but may set aside the report, and again refer the case. *Hidden* v. *Jordan*, 397.

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REHEARING.

1. Rehearing,—An equal division of the Justices of the Supreme Court upon the question of granting a rehearing is a denial of the rehearing asked for. *Ayres* v. *Bensley*, 632.

RENTS AND PROFITS.

See Mortgage, 8, 9, 10; Reference, 1.

RES JUDICATA.

1. Judgments Affirming Validity of Mexican Grants.—The judgment of the Board of Commissioners appointed by the United States to inquire into the validity of titles acquired from Mexico, or of the Courts of the United States on appeal, affirming a title derived from Mexico, when final, is conclusive upon the Government and upon all persons claiming under the Government by title subsequent. *Ward* v. *Mulford*, 365.

2. Judgments for Taxes.—Upon the question whether a judgment is merely voidable or absolutely void, there is no distinction between judgments for taxes and judgments for other causes of action. *Mayo* v. *Ah Loy*, 477.

3. Former Judgment in Bar must be Pleaded.—If two Mexican grants are so confirmed at different times as to overlap each other, and the owner of the one confirmed last is a party to the proceedings confirming the other, and the owner of the one confirmed first becomes a party to the proceedings resulting in the last confirmation, and fails to set up the first confirmation as a bar to having this grant confirmed so as to cover the same land, he cannot afterwards attack the last decree in a collateral proceeding. *Semple* v. *Wright*, 659.

4. Judgment by Consent.—One who is a party to an action and consents to a judgment, cannot afterwards attack this judgment in a collateral proceeding. *Id.*

See Partition, 2, 3, 4; Estoppel, 1, 2; Judgment, 9; Equity, 1, 2; Mexican Grants, 3; Taxes, 11, 12; Stipulation, 1.

ROADS AND HIGHWAYS.

1. Constitutionality of Law for Opening Roads.—The Legislature has the constitutional power, under the right of eminent domain, to pass laws for opening roads, called in the statute "private roads," from the main roads leading through the country to the residences or farms of individuals, and over lands not belonging to the persons to whose residences or farms the roads thus opened lead. *Sherman* v. *Buick*, 241.

2. Roads called "Private Roads" are for Public Use.—Roads leading from the residences or farms of individuals to the main road which runs through the country, called in the statute "private roads," are of public concern, and under the control of the Government, and are open to every one who may have occasion to use them, and are therefore public roads. *Id.*

3. Land taken for Roads is not Applied to Private Use.—A law providing for opening a road from the farm or residence of A, across the land of B, to a main road leading through the country, upon just compensation being made, does not have the effect of taking the private property of B and applying it to the private use of A. *Id.*

4. All Roads are Public.—The phrase "private road" is unknown to the common law. All "roads" are public. *Id.*

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5. ROADS IN SANTA CLARA COUNTY.—The act for opening roads in Santa Clara county provides for compensation to be made for the land taken for the road. *Id.*

6. LAYING OUT ROADS.—Whether a given road will subserve the public need or convenience is a question for the Government alone to determine. The Courts have nothing to do with it. *Id.*

See PLEADINGS, 13.

RULES OF COURT.

1. RULES OF COURT.—A rule of Court which requires each counsel to submit such instructions as he intents to ask, to the opposite counsel, before his final argument, under the penalty of having the same refused, may in many cases work injustice if strictly adhered to. *People* v. *Williams*, 280.

2. RULES OF COURT AS TO INSTRUCTIONS.—Instructions upon a material point in a criminal case should not be refused because not submitted to the opposing counsel before his final argument, in obedience to a rule of Court requiring it to be done. *Id.*

3. COURT MAY CONTROL ITS RULES.—Rules adopted by a Court are always under its control, and if there is any reason to apprehend that they will work injustice if strictly adhered to, they should be made to yield to the superior calls of justice. *Id.*

4. RULE OF COURT.—The appellate Court will not presume what are the rules of the Court below when they are not in the record. *Warden* v. *Mendocino County*, 655.

SACRAMENTO.

See TAXES, 8, 9, 10.

SALT MARSH LANDS.

See LANDS, 1.

SAN FRANCISCO.

1. COMMISSIONERS OF SINKING FUND IN SAN FRANCISCO.—The sales of land made by the Commissioners of the Sinking Fund of San Francisco on the 25th day of January, 1851, were void for want of power in the Commissioners. *Ellis* v. *Eastman*, 447.

See RAILROADS, 1; MUNICIPAL CORPORATIONS, 11, 12; TAXES, 5, 6, 13, 14, 15, 16; CONTRACTS, 6; CONSTITUTIONAL LAW, 2, 3.

SATISFACTION OF JUDGMENT.

See JUDGMENT, 3, 4, 5, 6.

SEAL.

See MORTGAGE, 18.

SEPARATE ESTATE.

See MARRIED WOMEN, 2, 3; DEED, 9; COMMON PROPERTY, 1.

SERVICE OF SUMMONS.

See SUMMONS, 1, 2, 3.

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SHAM ANSWER.

See PLEADINGS, 21.

SHERIFF.

See BOND, 1; PLEADINGS, 26, 27, 28, 29.

SPECIFIC CONTRACT ACT.

See JUDGMENT, 1, 7; MUNICIPAL CORPORATIONS, 10; PRACTICE, 11, 12.

STATEMENT.

See NEW TRIAL, 12; PRACTICE, 18.

STATE LANDS.

See LANDS, 1, 2, 3, 4; PATENT, 3, 4; MEXICAN GRANTS, 3, 4.

STATUTES CONSTRUED.

Practice Act, sec. 448, in Corcoran v. Doll, 82.

Section seven of the Act of 1861, in relation to public and private roads, (Statutes 1861, p. 389,) in Sherman v. Buick, 241.

Statute of 1851, p. 187, and Statute of 1850, p. 113, in relation to District Attorneys, in The People ex rel. Galvin v. Dorsey, 296.

Forcible Entry and Detainer Act, in Valencia v. Couch, 339.

The proviso to the third section of the Jury Law, (Laws 1860. p. 630, in The People v. Arceo, 40.

Law concerning Grand Jurors, in The People v. Manahan, 68.

Act creating Kern County, passed April 2d, 1866, and act creating the Sixteenth Judicial District, passed same day, in The People v. McGuire, 141.

Act concerning insolvent debtors, in Wilson v. His Creditors, 406.

Act of 1863, to authorize the Board of Supervisors of Sonoma County to contract for a map, in Bowers et al. v. Board of Supervisors of Sonoma County, 66.

The fifth section of Act to regulate fees in the City and County of San Francisco, approved February 6th, 1866, in Anderson v. Pennie, 265.

Seventeenth section of Statute of Limitations, in Stewart v. Thompson, 260.

Act authorizing the sale to the North San Francisco Homestead and Railroad Association of certain land, (Laws 1864, p. 482,) in Rondell v. Fay, 354.

The tenth and thirteenth sections of the Act of 1862, (Laws 1862, p. 397,) concerning street improvements in San Francisco, in Blatner v. Davis, 328.

Section three hundred and thirty-eight of the Practice Act, in Quivey v. Gambert, 304.

Statute concerning divorce, in Benkert v. Benkert, 467.

Section four of the Practice Act, in More v. Massini, 590.

Second section of Act of April 2d, 1866, concerning street railroads in San Francisco, in Robbins v. The Omnibus Railroad Company, 472.

Act of April 4th, 1864, in relation to street improvements in San Francisco, in Appeal of the North Beach and Mission Railroad Company, 499, and Piper's Appeal, 530.

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STATUTORY CONSTRUCTION.

1. ACT FOR MAP OF SONOMA COUNTY.—The act of the 28th of March, 1863, "to authorize the Board of Supervisors of Sonoma County to appropriate money for a map," is not mandatory on the part of the Board, but leaves the matter to its judgment. *Bowers* v. *Sonoma County*, 66.

2. CONSTRUCTION OF ACT.—If an act both authorizes and empowers, and makes it the duty of a Board of Supervisors to contract for a map, it will not be construed as mandatory. *Id.*

3. MEANING OF WORD USED IN TWO ACTS.—When two acts are *in pari materia*, or one is an amendment of the other, it will be presumed that a word used in a certain sense in the first act was used in the same sense in the subsequent one. *Robbins* v. *Omnibus Railroad Company*, 472.

4. CONSTRUCTION OF STATUTES.—In construing statutes the object to be accomplished by the act is to be ascertained, and its provisions considered, and so construed, if possible, that all its parts may have effect and operate harmoniously to effectuate that object. *Appeal of North Beach and Mission Railroad Company*, 499.

See COUNTIES, 1, 2.

STIPULATION.

1. STIPULATION CONCERNING JUDGMENT.—A stipulation between parties to an action as to the kind of judgment to be entered, whatever force it may have in regulating the judgment to be entered, does not impair the effect of the judgment which is entered, even if not entered in accordance with the stipulation. *Semple* v. *Wright*, 659.

STREETS.

See MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 5, 6, 7, 8, 11; CONSTITUTIONAL LAW, 2; RAILROADS, 3, 4; TAXES, 13, 14, 16, 17, 18, 19, 20, 21; CONDEMNATION OF LAND, 1.

SUMMONS.

1. PUBLICATION OF SUMMONS.—A publication of a summons weekly against a non-resident defendant, commencing on the 10th day of January, and ending on the 9th day of April, is a publication of three full calendar months, and the first day of the forty within which the defendant is required to answer is the 10th of April. *Savings and Loan Society* v. *Thompson*, 347.

2. IDEM.—If the last day of the publication of a summons is in the same week in which the three months expires, the publication is sufficient to give the Court jurisdiction, although this day is less than three months from the first day of publication. *Id.*

3. PUBLICATION OF SUMMONS ON SUNDAY.—If some of the publications of a summons, including the last, are made on Sunday, in the regular issues of the paper, it does not vitiate the service. *Id.*

SUPREME COURT.

1. OPINION OF SUPREME COURT ON APPEAL.—The presumption is, that all the facts in a record, bearing on the points decided, have received due consideration by the Supreme Court, whether all, or a part, or none of those facts are mentioned in the opinion. *Mulford* v. *Estudillo*, 131.

See JUDGMENT, 2, 4, 6, 11; PLEADINGS, 5; LAW OF A CASE, 1, 2; RULES OF COURT, 4; REHEARING, 1.

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SURETIES.

See APPEAL BOND, 1, 2; PROMISSORY NOTE, 9; PLEADINGS, 26, 27, 28, 29, 30.

SWAMP LANDS.

See PATENT, 3.

TAXES.

1. PROPERTY EXEMPT FROM TAXATION.—The property of all asylums and charitable institutions which are supported in whole or in part by the State, is exempt from taxation. *San Francisco Ladies' Protection and Relief Society* v. *Story*, 65.
2. RECITALS IN TAX DEED.—It is not necessary in the recitals in a tax deed, given for land sold for the taxes of 1857-8, to state in what manner the tax had been levied or the rate of taxation, nor for what amount the land was assessed by the Assessor, nor that a certificate of sale was filed with the County Recorder. *Wetherbee* v. *Dunn*, 106.
3. TAX COLLECTOR.—It is not necessary, before introducing a tax deed in evidence, to prove that the person by whom it was executed held the office of Tax Collector at the time when the sale was made. *Id.*
4. DESCRIPTION IN ASSESSMENT AND TAX DEED.—A tax deed which describes the property conveyed as "Block No. 25, less a lot belonging to Bryant, 70 by 137½, in the southeasterly corner," is not void on the ground that the description of the premises is insufficient, nor because it was assessed by that description. *Id.*
5. ASSESSMENT OF LOT FOR STREET IMPROVEMENT.—If a lot in San Francisco is assessed for a street improvement to a person by name, and not to unknown owners, the contractor cannot recover judgment against another person for the assessment. *Blatner* v. *Davis*, 328.
6. IDEM.—An assessment on a lot in San Francisco for a street improvement, made to a person by name, is an assessment to him as owner. Such assessment, to be valid, must be made to the owner, if known. *Id.*
7. STREET ASSESSMENTS IN SACRAMENTO.—Street assessments in Sacramento are required to be levied and collected as provided in the general revenue laws of the State. *Mayo* v. *Ah Loy*, 477.
8. IDEM.—Assessments for improvement of streets in Sacramento are required to be listed to the owner, if known; if not known, to him as "unknown owner." *Id.*
9. IDEM.—If such assessment is not paid, the District Attorney must sue the person assessed, the real estate, and "all owners and claimants" to the same. *Id.*
10. CONCLUSIVENESS OF JUDGMENT FOR TAXES.—When such assessment is thus made and the suit is thus brought, and the summons is properly served, the judgment when rendered is conclusive and binding upon all the world. *Id.*
11. VOIDABLE JUDGMENT FOR TAXES.—Although property on I street cannot be lawfully taxed for improvements on J street, yet if it is done, and suit is brought and service of process obtained and judgment rendered as required by law, the judgment is not void, but only erroneous and liable to be reversed on appeal. *Id.*
12. VOID JUDGMENT FOR TAXES.—If the owner of the property assessed for street improvements in Sacramento is not made a party to a suit to collect the same, and the action is not brought against "all owners and claimants," and service is not made on the real estate, the judgment is void. *Id.*
13. QUESTIONS CONSIDERED ON APPEAL.—Upon an appeal from a judgment of the County Court confirming the report of Commissioners in apportioning the ex-

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penses of widening a street according to the benefits received, it is unnecessary to consider the questions arising upon the proceedings for collecting the assessment made for such expenses, or whether the amount assessed is properly made a lien on property, or whether the mode of enforcing payment of the assessment is constitutional. *Appeal of N. B. and Mission R. R. Co.*, 499.

14. ERROR TO BE SHOWN BY RECORD.—Upon an appeal from a judgment of the County Court confirming the report of Commissioners apportioning expenses for widening a street among lot owners and railroad corporations, unless the record shows a different state of facts, the presumption, under the provisions of said act, is that such expenses were apportioned according to the benefits received by each. *Id.*

15. IDEM.—All presumptions, under the express provisions of the act, are in favor of the correctness of the action of such Commissioners. It devolves on one objecting to the confirmation of their report to show error. *Id.*

16. ESTIMATE OF BENEFITS RESULTING FROM WIDENING STREET.—It is not erroneous for Commissioners appointed to estimate the benefits that will result to property holders by the widening of a street, to assess the same upon the hypothesis that all lots on the street will be benefited in the ratio of their values, provided there is evidence warranting such a conclusion. *Appeal of Piper*, 530.

17. ASSESSMENTS ON LOT OWNERS FOR WIDENING STREET.—If Commissioners appointed to assess damages and estimate benefits to lot owners for widening a street apportion the amount of money to be raised into two or more parts, one part on the property holders of the street to be widened, and another part on the owners of property fronting on the cross streets determined to be benefited, and no complaint is made as to the correctness of this apportionment, the owners of lots on the street to be improved cannot complain of the manner in which the part apportioned to the cross streets is afterward apportioned among the property holders on those streets, and *vice versa*. *Id.*

18. BENEFITS ACCRUE TO LAND.—The benefits resulting from the widening of a street accrue to the owner through his estate in the land, whether the estate be a fee or a leasehold, and not through the buildings thereon. The enhancement in value accrues to the land, not to the buildings. *Id.*

19. ASSESSMENTS ON CROSS STREETS BENEFITED, CONSTITUTIONAL.—A statute authorizing the assessment of a portion of the expenses for widening a street in a city upon lots benefited, situate on cross streets adjacent to the street to be widened is constitutional. *Id.*

20. IDEM.—A statute authorizing the Board of Supervisors of the city and county of San Francisco to determine what part of the city will be benefited by the widening of a street, and to assess the expense of the improvement upon the specific portion of the city thus determined to be peculiarly benefited, is constitutional. *Id.*

21. OWNER OF FEE OF LOT TO PAY TAX FOR WIDENING STREET.—The Commissioners appointed to estimate benefits and assess damages for widening a street in San Francisco under the act of April 4th, 1864, may properly assess the expenses to be borne by a lot which is under lease, to the owner of the fee, where the benefits all accrue to such owner, without apportioning any part of the same to the lessee. *Appeal of Reese*, 567.

See MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 5, 6, 7, 9, 10; CONSTITUTIONAL LAW, 2; RAILROADS, 2, 3; CERTIORARI, 3, 4; PRACTICE, 17.

TAX COLLECTOR.

See JUDICIAL NOTICE, 1.

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TAX DEED.

See TAXES, 2, 3, 4; EVIDENCE, 1, 2.

TENANT IN COMMON.

1. TENANT IN COMMON.—If an undivided portion of land is common property, and the remaining undivided part is the separate property of the wife, the grantee of the husband becomes a tenant in common with the wife or those claiming under her. *Ewald* v. *Corbett*, 493.

See HOMESTEAD, 1; EJECTMENT, 25.

TESTIMONY.

See EVIDENCE, 16.

TENDER.

See MORTGAGE, 1, 2.

TIDE LANDS.

See LANDS, 2, 3, 4.

TITLE.

1. PATENT FOR LAND.—A patent for land, issued by the United States to "James Smith, administrator of Robert Smith, deceased," vests the legal title to the land in James Smith, and said James Smith's conveyance of the same transfers the legal title to his grantee, though it does not state that it is made as administrator. *Bonds* v. *Hickman*, 202.

2. LEGAL TITLE TO CONFIRMED MEXICAN GRANT.—A judgment of the Board of Land Commissioners, or of the District Court of the United States, that the claim of the petitioner to a Mexican or Spanish grant is valid, and that the same be confirmed, vests in the petitioner the legal title, notwithstanding he petitioned as administrator with the will annexed of the estate of the grantee, by which will the land was devised to several different persons, himself among the number, and stated the contents of the will in his petition, and prayed that the land might be confirmed to the parties entitled thereto, and notwithstanding his appointment as administrator was void. *O'Connell* v. *Dougherty*, 458.

3. IDEM, EQUITABLE TITLE.—In such case, the devisees under the will, other than the petitioner, have an equitable title, and the confirmee holds the legal title as trustee for the benefit of the devisees. *Id.*

See EQUITY, 1, 2; MEXICAN GRANTS, 1, 2, 3, 4; CONDEMNATION OF LAND, 1; DEED, 10.

TRANSCRIPT.

See PRACTICE, 2.

TREATY OF GUADALUPE HIDALGO.

See MEXICAN GRANTS, 1, 2, 3, 4.

TRESPASS.

1. TRESPASS ON LANDS.—If the complaint, in an action to recover damages for an alleged trespass, avers that the defendant unlawfully entered on plaintiff's land and tore down a gate, the gist of the action is the entry, and the removal of the gate is mere matter of aggravation; and if the plaintiff fail to prove the gist he cannot recover for the matter of aggravation. *Pico* v. *Colimas*, 578.

See DAMAGES, 1, 2; PLEADINGS, 23, 24, 25, 26, 27, 28, 29; EASEMENT, 1; ASSIGNABLE DEMAND, 1.

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TRIAL.

1. A TRIAL.—A trial is the examination before a competent tribunal, according to the law of the land, of the facts or a question of law put in issue in a cause, for the purpose of determining such issue. *Anderson* v. *Pennie*, 265.
2. IDEM.—If the plaintiff, after the summons is served, and on the return day, without any other proceedings, directs the Justice to enter a judgment of discontinuance, no trial is had or entered upon. *Id.*

See VENUE, 1.

TRUSTS AND TRUSTEES.

1. TRUSTEE OF EXPRESS TRUST.—A guardian of an infant, appointed by the Probate Court, is not a trustee of an express trust within the meaning of section six of the Practice Act. *Fox* v. *Minor*, 111.

See WILL, 4; TITLE, 2, 3; DEED, 10.

ULTIMATE FACT.

See PLEADINGS, 5.

VAN NESS ORDINANCE.

See EJECTMENT, 1.

VARIANCE.

1. VARIANCE BETWEEN PLEADINGS AND PROOFS.—A judgment will not be reversed on the ground of variance between the pleadings and proofs when the variance does not mislead the appellant to his prejudice. *Began* v. *O'Reilly*, 11.
2. IDEM.—The seventy-first section of the Practice Act, requiring immaterial variances between the pleadings and proofs to be disregarded, is a most beneficial provision, and should be literally construed and carried out. *Id.*

See PROMISSORY NOTE, 3.

VENDOR AND VENDEE.

See LIEN, 1.

VENUE.

1. TRIAL AFTER CHANGE OF VENUE.—If the defendant procures a change of venue, the plaintiff may pay the costs and transmit the papers to the county fixed as the place of trial, and have the case placed on the calendar and tried. *Brooks* v. *Douglass*, 208.

See CRIMINAL LAW, 27.

WAIVER.

See APPEAL BOND, 1, 2.

WATER COMMISSIONERS.

1. WATER COMMISSIONER.—A Water Commissioner appointed under the Act of May 15th, 1854, to regulate watercourses, etc., has no power, as such, to repair a watercourse or to remove an obstruction from it. *Pico* v. *Colimas*, 578.

WATER RIGHTS.

1. PRIOR RIGHT TO WATER BY APPROPRIATION.—A person who has appropriated the water of a stream, and caused it to flow to a particular place by means of a ditch,

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for a special use, may afterwards change the use to which he first applied the water, and the place at which he used it, without losing his priority of right, as against one who has dug a ditch from the same stream before the change is made. *Davis* v. *Gale*, 26.

2. IDEM.—One who has appropriated the water of a stream by means of a ditch for the purpose of working a particular mining claim, may, after he has worked out the claim and abandoned the same, extend his ditch and use the water at other points, and for a different purpose, without losing his priority of right as against one who afterwards dug a ditch from the same stream and appropriated water before the claim was worked out. *Id.*

3. RIGHT TO WATER.—Appropriation and use for a beneficial purpose are the tests of right to water in the mineral regions, while the place and character of its use are not such tests. *Id.*

4. ABANDONMENT OF WATER RIGHT.—The facts that water was appropriated for a particular purpose, and that the purpose has been fully accomplished, and that when accomplished the appropriators dispersed and allowed a long time to elapse without using the ditch, and then sold it for a nominal sum, may be received in evidence as tending to show abandonment. *Id.*

5. IDEM.—One who has abandoned his prior right to the use of water cannot by afterwards making a sale of the same revive his prior right in favor of his grantees, even if the sale is made in good faith. *Id.*

6. STATUTE OF LIMITATIONS AS TO WATER.—If one who has the prior right to the use of water permits another to acquire and hold for five years continuous adverse possession of the same, or any part thereof, he loses his right to the same or that part thereof which the adverse possessor enjoyed. *Id.*

7. TURNING WATER INTO STREAM WITHOUT INTENDING TO RECAPTURE IT.—If two persons, one prior in point of time to the other, appropriate water from the same stream, by means of ditches, and a third person turns water into the stream from his ditch starting out of another stream, without the intention of recapturing it, the water thus turned in becomes *publici juris*, and belongs to the persons who appropriated the stream, according to their priority of right. *Id.*

8. RIGHTS OF PRIOR APPROPRIATOR OF WATER.—If two persons appropriate water from the same stream, one prior in point of time to the other, and a third person builds a flume in the stream so as to increase the flow of water, the prior appropriator is first entitled to the increased flow of water, to the extent of his appropriation. *Id.*

9. STATUTE OF LIMITATIONS AS TO WATER RIGHTS.—If one who has taken adverse possession of water, as against a prior appropriator, suffers a portion of the same to flow down to accommodate miners working in the stream, this does not prejudice his adverse possession so as to prevent the Statute of Limitations from running. *Id.*

10. INJURY TO WATER USED FOR MINING.—Where a large number of persons are mining on a small stream, and each deteriorates the water a little, so that the combined acts of all render the water unfit for use, each cannot successfully defend an action on the ground that his act alone did not materially affect the water. *Hill* v. *Smith*, 166.

See WATER COMMISSIONERS, 1.

WIDENING STREETS.

See TAXES, 14, 15, 16, 17, 18.

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WILL.

1. CONSTRUCTION OF WILL.—If the testator devises his "flour mill, with the land pertaining thereto, a half league, more or less," and he owns a large tract of land around the mill, and there is no inclosure around the mill, and no portion of it has any special relation to the business carried on at the mill, the entire tract of land passes by the will to the devisee, upon the death of the testator. *Bruck* v. *Tucker*, 425.
2. IDEM.—If the whole tract of land around the mill which beelongs to the testator in such case is less than half a league, it will be assumed that he intended to give the whole tract. *Id.*
3. WHAT PASSES BY WILL.—If the testator in his lifetime conveys or contracts to convey a part of a tract of land devised by him, the will, upon his death, operates only upon so much of the land as legally and equitably belonged to him at his death. *Id.*
4. ADMINISTRATOR WITH WILL ANNEXED.—If the testator appoints an executor of his will, and the executor dies, and an administrator with the will annexed is appointed, the administrator with the will annexed, under the statutes of California, possesses all the power conferred on the executor named in the will, and can sell the land devised if the executor could have sold it. *Kidwell* v. *Brummagim*, 436.
5. POWER TO SELL GIVEN IN A WILL.—When the testator in his will directs his executor, within one year after his decease, to sell his real estate, the proceeds to be disposed of upon certain trusts, the power to sell is not limited to one year, but may be exercised after that time, unless there are express words in the will showing the intention of the testator to thus limit the exercise of the power. *Id.*

See EVIDENCE, 16, 17.

WITNESS.

1. CROSS-EXAMINATION.—Where a witness testified in chief that a piece of land was assessed for taxes, it is not a cross-examination to ask him the usual way of selling property for taxes, or whether another piece of land was sold for taxes. *Wetherbee* v. *Dunn*, 106.
2. COMPETENCY OF WITNESS ON TRIAL ABOUT CONFIRMING REPORT.—A Commissioner appointed to estimate benefits and assess damages to lot owners in the matter of widening a street in a city, is a competent witness on a trial in the County Court upon the question of confirming the report of the Commissioners when objections are made to it. *Appeal of Brooks and Josephs*, 558.

WRIT OR ERROR.

1. CITATION UPON WRIT OF ERROR, AND UNDERTAKING THEREON.—The Judge of the United States District Court for the District of Oregon has no authority, while holding the Circuit Court of the United States for the District of California, to sign a citation upon a writ of error from the Supreme Court of the United States to the Supreme Court of this State, nor has he authority to take and approve of the security required in order to make the writ of error a supersedeas and operate as a stay of execution upon the judgment to be reviewed. *Timpkins* v. *Mahoney*, 231.

WRIT OF RESTITUTION.

See EJECTMENT, 24.

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